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CRIMINAL LAW: 2002-2004 SURVEY OF FLORIDA LAW

WILLIAM E. ADAMS, JR.*

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I. INTRODUCTION

This article reviews decisions by the Supreme Court of Florida in the substantive area of criminal law published between May 1, 2002 and September 1, 2004.¹ The time period begins where the last criminal law review survey created for this Law Review ended.² This article will follow the conventions in selecting cases for discussion utilized in prior criminal law survey articles.³ As in past surveys, this article will focus on significant cases dealing with substantive issues concerning the area of criminal law decided by the Supreme Court of Florida, but it will not address district courts of appeal decisions that have not been appealed to the supreme court, nor will it discuss cases that only deal with evidentiary or procedural issues raised on appeal.⁴

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1. The author has selected, as the beginning and ending points of this article, decisions reported in Volumes 804 through 877 of the Southern Reporter, Second Series.

2. See William E. Adams, Jr., *Criminal Law: 2000-2002 Survey of Florida Law*, 27 NOVA L. REV. 1 (2002).

3. As in past criminal law surveys, this article will not address issues concerning criminal procedure, such as search and seizure. Although significant to the practitioner, those issues raise constitutional concerns that extend beyond the substantive focus of this piece. Furthermore, consistent with past articles, this survey will not generally address the complex and specialized areas of death penalty and sentencing guidelines. The article will address select sentencing and procedural cases that involve disputes about the definition of substantive crimes.

4. The article does not cover every decision issued by the Supreme Court of Florida during this time period. As in past criminal law surveys, cases that simply apply standard fact patterns to well-settled rules of law are not discussed. Instead, the survey attempts to identify and discuss cases that have settled conflicts, interpreted statutes for the first time, or altered

During this two-year period, most of the cases selected have clarified conflicts between the district courts of appeal concerning the interpretation of a variety of criminal statutory provisions. Section II will discuss a number of cases in which defendants challenged the finding that they had premeditated the killings that they committed. In Section III, the article will look at the required mens rea for some controlled substance statutes. Section IV revisits an issue discussed in the last criminal law summary in this Law Review: the correct application of the “remaining in” phrase in the state’s burglary statute. Section V deals with cases that involve disputes concerning the interpretation of a variety of criminal law statutes. As has been the case with previous criminal law surveys in this Law Review, the Supreme Court of Florida has considered a number of challenges involving new statutory interpretation questions and has also revisited some recurring issues.

II. HOMICIDE

As one leading commentator on criminal law has noted, almost all states that divide murder into grades include “willful, deliberate, [and] premeditated” killings as first-degree murder.⁵ Florida’s homicide statute continues to maintain that a “premeditated design” is a condition that will elevate a homicide to a first-degree capital felony.⁶ Although commonly used, courts have had much difficulty in applying this term in a precise and consistent manner.⁷ Rather than designate a certain minimum amount of time that will satisfy the standard, the Supreme Court of Florida has stated its standard for this phrase to mean a “fully formed conscious purpose to kill,” which may be “formed a moment before the act but must exist for a sufficient length of time to permit reflection as to the nature of the act to be committed and the probable result of that act.”⁸ The court has also noted that it can “be formed in a moment and need only exist ‘for such time as will allow the accused to be conscious of the nature of the act he is about to commit and the probable

existing understandings of a statutory provision, or otherwise clarified or changed the substantive criminal law in Florida.

5. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 31.03[C][1] (3d ed. 2001).

6. FLA. STAT. § 782.04 (1)(a) (2003). “The unlawful killing of a human being: 1) When perpetrated from a premeditated design to effect the death of the person killed or any human being . . . is murder in the first degree and constitutes a capital felony, punishable as provided in s. 775.082.” *Id.*

7. *Id.*

8. Woods v. State, 733 So. 2d 980, 985 (Fla. 1999) (quoting Wilson v. State, 493 So. 2d 1019, 1021 (Fla. 1986)).

result of that act.”⁹ In order to satisfy this elusively imprecise standard, the Supreme Court of Florida has attempted to provide guidance by stating that the following factual circumstances can support an inference that the killer’s state of mind satisfies the premeditation requirement: “the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted.”¹⁰

In the past two years, the Supreme Court of Florida has had the opportunity to discuss how this test should be applied to a number of appealed homicide cases. In *Morrison v. State*,¹¹ the court found that the nature of the stab wounds, and the fact that the victim could have identified the victim, were circumstances that supported the finding of premeditation.¹²

In *Evans v. State*,¹³ the court was able to point to a number of pieces of evidence that indicated that the defendant had considered killing the victim before the fatal act.¹⁴ The defendant had told a number of witnesses that he was going to “‘take care of his brother’s work’ for him” and specifically told his prison-mate, before he was released from prison, that he was going to kill his brother’s girlfriend, whom he believed was unfaithful to his brother.¹⁵ In addition, there was evidence on the evening of the shooting that he was looking for the victim.¹⁶

Similarly, the court found sufficient evidence of premeditation in *Floyd v. State*.¹⁷ The evidence in this case included “selection and transportation of a gun to the victim’s home,” remaining in the victim’s home for a significant period of time before shooting her, chasing the victim, and stating one day prior to the killing that he was going to “kill his wife or someone she loved” (the victim was the defendant’s mother in law).¹⁸

In *Conde v. State*,¹⁹ the court considered that the defendant had spent considerable time with the victim before attacking her, the victim had struggled during the attack, “it takes approximately three minutes to strangle someone to death,” and that the defendant had murdered five other victims in

9. *Blackwood v. State*, 777 So. 2d 399, 406 (Fla. 2000) (quoting *DeAngelo v. State*, 616 So. 2d 440, 441 (Fla. 1993)).

10. *Holton v. State*, 573 So. 2d 284, 289 (Fla. 1990).

11. 818 So. 2d 432 (Fla. 2002).

12. *Id.* at 453.

13. 838 So. 2d 1090 (Fla. 2002).

14. *Id.* at 1095.

15. *Id.*

16. *Id.*

17. 850 So. 2d 383 (Fla. 2002).

18. *Id.* at 397.

19. 860 So. 2d 930 (Fla. 2003).

similar fashion.²⁰ Taken together, the court found that these circumstances constituted more than sufficient evidence of premeditation.²¹ Similarly, in *Johnston v. State*,²² the court found that evidence of manual strangulation and defensive bruising on the victim—showing that she had struggled with her assailant—were sufficient to support a finding of premeditation.²³

It surely appears that the supreme court was correct in holding that these defendants had formed a conscious purpose to kill more than a moment before the fatal act. It is hard to argue that these particular defendants did not understand the nature of their acts or the probable results. This seems particularly easy in the strangulation cases where it takes more than a moment to strangle someone and in these cases, the defendants overcome the struggling defensive actions of the victims.²⁴ In none of these cases did the court push the limits of the brevity of time that even its definition of premeditation could arguably permit, and some formulations of which by some courts have come under criticism by commentators.²⁵

III. CONTROLLED SUBSTANCES

In a series of cases, the Supreme Court of Florida has also taken a look at what the knowledge element in the statute outlawing the possession of controlled substances requires. In *Scott v. State*,²⁶ the defendant was charged with the possession of contraband in a correctional facility.²⁷ At the conclusion of the trial, defense counsel requested a jury instruction, pursuant to the court's prior opinion in *Chicone v. State*,²⁸ that the element of knowledge requires that the defendant have "knowledge of the illicit nature of the substance possessed."²⁹ The court reiterated that mere knowledge of possession

20. *Id.* at 943.

21. *Id.*

22. 863 So. 2d 271 (Fla. 2003).

23. *Id.* at 285.

24. See *Johnson v. State*, 863 So. 2d 271 (Fla. 2003); *Floyd v. State*, 850 So. 2d 383 (Fla. 2002).

25. See, e.g., WAYNE R. LAFAVE, PRINCIPLES OF CRIMINAL LAW, § 13.7(a) (Thompson West 2003) (criticizing statements that premeditation "require[s] only a brief moment of thought" or a "matter of seconds."); see also DRESSLER, *supra* note 5 at §31.04[C][3] (criticizing formulations that premeditation can be satisfied by "[a]ny interval of time between the forming of the intent to kill and the execution of that intent, which is of sufficient duration for the accused to be fully conscious of what he intended" or that "no time is too short for a wicked man to frame in his mind the scheme of murder.").

26. 808 So. 2d 166 (Fla. 2002).

27. *Id.* at 168.

28. 684 So. 2d 736 (Fla. 1996).

29. *Scott*, 808 So. 2d at 168.

of the substance was not sufficient; the defendant must also know the nature of the substance.³⁰ Furthermore, the court rejected the argument that the lack of knowledge of the illicit nature of the substance is an affirmative defense.³¹ The court explained how this case impacted its earlier opinion in *State v. Medlin*,³² which seemed to be creating some confusion in the district courts of appeal.³³ In the *Medlin* case, the court had held that the possession of a controlled substance raises a rebuttable presumption that the possessor is aware of the nature of the drug possessed.³⁴ The court noted that the *Medlin* presumption applied in cases where the defendant had actual possession of the contraband, and even then, only after the element of the illicit nature of the drug was first explained to the jury.³⁵ In the *Scott* case, the drugs were found in the defendant's locker.³⁶ Justice Wells argued in dissent that the element was to be determined by the legislature, and that lack of knowledge should be an affirmative defense.³⁷

In a subsequent case, *McMillon v. State*,³⁸ the Supreme Court of Florida ruled that it was reversible error to deny a *Chicone* instruction in a case of actual possession, but that the state was also entitled to a *Medlin* instruction in such a case.³⁹ Similarly, the court in *Washington v. State*⁴⁰ held that the failure to provide the *Chicone* instruction in a case in which the defendant sold a bag of cannabis was reversible error.⁴¹ In yet another case, *Williamson v. State*,⁴² the defendant was charged with illegal possession of codeine,⁴³

30. *Scott*, 808 So. 2d at 169 (citing *Chicone v. State*, 684 So. 2d 736, 744 (Fla. 1996)).

31. *Id.*

32. 273 So. 2d 394 (Fla. 1973).

33. *Id.* at 395.

34. *Id.* at 397.

35. *Scott*, 808 So. 2d at 171.

36. *Id.* at 172.

37. *Id.* at 173.

38. 813 So. 2d 56 (Fla. 2002).

39. *Id.* at 58. The erroneous jury instruction used by the trial court was the standard jury instruction for possession cases. *Id.* The supreme court held this instruction inadequate because it did not "indicate that the State must prove the defendant had knowledge of the illicit nature of the substance he possessed . . . [f]ailure to so instruct diminishes the State's responsibility to prove each element of its case." *Id.*

40. 813 So. 2d 59 (Fla. 2002).

41. *Id.* at 60.

42. 813 So. 2d 61 (Fla. 2002).

43. See *id.* at 62. Williamson was charged with violating section 893.13(6)(a) of the *Florida Statutes*, which provides that:

It is unlawful for any person to be in actual or constructive possession of a controlled substance unless such controlled substance was lawfully obtained from a practitioner or pursuant to a valid prescription or order of a practitioner while acting in the course of his or her professional practice or to be in actual or constructive possession of a controlled substance except as otherwise authorized by this chapter.

and the court attempted to further explain the interrelationship of the two instructions.⁴⁴ In *Williamson*, the defendant was charged with stealing pills marked "Tylenol," below which the word "codeine" was written; however, the word was written in such fine print that it could not be read without the aid of a microscope.⁴⁵ In reversing the conviction for error because the trial court had refused to give the *Chicone* instruction, the court again noted that the *Medlin* presumption was applicable to cases in which the defendant had actual possession or exclusive constructive possession, but that the presumption might not be sufficient when there is other evidence which tends to negate it.⁴⁶ Certainly, the *Chicone* and *Medlin* decisions have led to confusion about the interrelationship of the opinions and the instructions to be given in possession cases.⁴⁷ The court's attempt to provide an explanation should be helpful to Florida trials and lower appellate courts in the future.

IV. BURGLARY

The Supreme Court of Florida continued to address the application of the burglary statute in relationship to its prior holdings in the case previously discussed in Section II, *Floyd v. State*. In the most recent summary of Florida criminal law in this Law Review,⁴⁸ the author discussed the disagreement between the Supreme Court of Florida, as per its opinion in *Delgado v. State*,⁴⁹ and the Florida Legislature over the proper interpretation concerning the "remaining in" portion of the state's burglary statute,⁵⁰ as well as, the legislature's subsequent attempt to overturn the court's interpretation of that provision.⁵¹ In *Floyd*, the contested jury instruction did not include a finding that the defendant remained in the victim's home surreptitiously; therefore, the court reversed the armed burglary conviction, and was thus required to reverse the felony murder conviction as well, because the burglary was the

Id. at 64.

44. *See id.* at 64-5.

45. *Id.* at 63.

46. *Id.* at 64.

47. *See Chicone v. State*, 684 So. 2d 736 (Fla. 1996); *see State v. Medlin*, 273 So. 2d 394 (Fla. 1973).

48. Adams, *supra* note 2, at 4-7.

49. 776 So. 2d 233 (Fla. 2000).

50. Adams, *supra* note 2, at 4-7.

51. *See Adams, supra* note 2, at 4-7. The relevant part of the statute, prior to amendment by the legislature, stated that burglary included "remaining in a structure or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter or remain." FLA. STAT. § 810.02(1) (1989). The *Delgado* case held that the defendant was only guilty of burglary if his remaining in the structure or conveyance was done surreptitiously. *Delgado*, 776 So. 2d at 237.

predicate felony for the felony murder conviction.⁵² Despite the fact that the legislature indicated its desire to nullify the holding in *Delgado*, the court noted that the amendment to the Act was made to operate retroactively to February 1, 2000, and the killing in this case occurred prior to that date.⁵³ The majority's holding in *Floyd* drew a dissent from Justice Wells, who argued that the legislature's intent in amending the burglary statute was to completely nullify the holding in *Delgado*, which it believed improperly interpreted the burglary statute.⁵⁴

The court also attempted to clarify its *Delgado* decision in the *Morrison* case discussed in Section II of this article.⁵⁵ It noted that the victim's failure to lock the door after telling the defendant that he could not come into the apartment, and then closing the door, negated the defendant's argument that his entry had been consensual; therefore, his case was similar to *Delgado* where the victim had originally consented to the entry, but then withdrew it.⁵⁶ This rejection seems to be a reasonable construction of its earlier decision and the burglary statute.⁵⁷

In *State v. Byars*,⁵⁸ the Supreme Court of Florida addressed the scope of the "open to the public" provision of the burglary statute.⁵⁹ The accused in *Byars* entered his wife's place of employment, a consignment store, despite a domestic violence injunction prohibiting his presence there, and killed his wife.⁶⁰ The court found that the statute's reference to the public nature of the premises was to be interpreted to refer to the general nature of the premises, not the personal characteristics of the individual charged with the crime.⁶¹ It thus held that the injunction was irrelevant to the consideration of whether the premises were open to the public.⁶² The majority rejected contrary decisions from other states and an argument of a contrary construction of the Florida trespass statute because of differences in statutory language.⁶³ The

52. *Floyd v. State*, 850 So. 2d 383, 402 (2003).

53. *Id.*

54. *Id.* at 411. (Wells, J., concurring in part and dissenting in part).

55. *Morrison v. State*, 818 So. 2d 432 (Fla. 2002).

56. *Id.* at 454.

57. *Id.*

58. 823 So. 2d 740 (Fla. 2002).

59. Section 810.02 of the *Florida Statutes*, says in part: "Burglary means entering or remaining in a dwelling, structure, or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter or remain." FLA. STAT. § 810.02 (2003).

60. *Byars*, 823 So. 2d at 740.

61. *Id.*

62. *Id.* at 743.

63. *Id.* at 743-45.

statutory construction given to the statute by the court seems to be the most reasonable one.⁶⁴

V. OTHER CRIMES

The Supreme Court of Florida also dealt with a number of other substantive criminal issues during the past two years. In *Wright v. State*,⁶⁵ “Wright was the driver of a vehicle from which [his] two cohorts wearing masks emerged and robbed another driver.”⁶⁶ Wright, who was not wearing a mask, had his crime reclassified to the next higher degree under the Florida statute increasing the severity of the category of crimes committed while the offender was wearing one.⁶⁷ The majority properly held that the statute requires that the defendant personally wear a hood, mask, or similar device, in order to have his crime enhanced.⁶⁸ Chief Justice Wells⁶⁹ dissented, arguing that the legislature intended that an accomplice could be vicariously liable by making this act a separate substantive crime, as opposed to merely a sentence enhancer.⁷⁰

The Supreme Court of Florida considered the constitutionality of a driver’s license statute in *Florida Department of Highway Safety & Motor Vehicles v. Critchfield*.⁷¹ In *Critchfield*, the defendant had his license permanently revoked in 1987 after his fourth DUI conviction.⁷² At the time of his sentencing, he was told that he would be eligible for a hardship license after five years.⁷³ However, when he applied in 1999, he was informed that he

64. *Id.*

65. 810 So. 2d 873 (Fla. 2002).

66. *Id.* at 874.

67. See FLA. STAT. § 775.0845 (2003). Section 775.0845 of the *Florida Statutes* provides:

The felony or misdemeanor degree of any criminal offense, other than a violation of . . . [sections] 876.12-87.15, shall be reclassified to the next higher degree as provided in this section if, while committing the offense, the offender was wearing a hood, mask, or other device that concealed his or her identity.

Id.

68. *Wright*, 810 So. 2d at 874.

69. Formerly referred to as Justice Wells. Rule 2.030(2)(a) of the *Florida Rules of Judicial Administration* provides that “[t]he chief justice shall be chosen by a majority vote of the justices for a term commencing on July 1 of even-numbered years. If a vacancy occurs, a successor shall be chosen promptly to serve the balance of the unexpired term.” FLA. R. JUD. ADMIN. 2.030 (2)(a).

70. *Wright*, 810 So. 2d at 876.

71. 842 So. 2d 782 (Fla. 2003).

72. *Id.* at 783.

73. *Id.* at 784–85.

was no longer eligible because of a change in the law.⁷⁴ The court found that the amendment violated Florida's state constitutional requirement that each statute contain but one subject.⁷⁵ The amendments to the driver's license statute also contained an amendment to the bad check statute, which involves the assignment of a bad check debt to a private debt collector.⁷⁶ The court correctly considered this provision to be unrelated to the provisions regulating criminal penalties related to driver's licenses.⁷⁷ Justice Cantero argued that the provision should be upheld because one of the amendments in the Act also provided for suspension of drivers' licenses for those passing worthless checks.⁷⁸ The dissent also argued that doubts about whether the single subject requirement was violated should be resolved in favor of upholding a statute.⁷⁹ Although it is true that the section on driver's license revocation for passing bad checks was related to the other provisions relating to driver's licenses, this arguably should not save this provision whose relationship to most of the amendment was unrelated.⁸⁰ The need to prevent "logrolling" is of sufficient importance to require the legislature to separate out unrelated provisions when it proposes legislation into separate bills.⁸¹

In a separate case, the court considered a concept that has perplexed courts, scholars, and law students throughout the ages.⁸² In *Reynolds v. State*, the question was whether a crime is one that requires a general or a specific intent by the defendant.⁸³ In this case, Ronald Reynolds was convicted of felony animal cruelty,⁸⁴ which he argued required a specific intent or, in the alternative, was unconstitutional if it did not so require.⁸⁵ The issue

74. *Id.*

75. *Id.* at 784–85. Article III, section 6, of the Florida Constitution provides, in pertinent part: "[e]very law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title" FLA. CONST. art. III, § 6.

76. *Critchfield*, 842 So. 2d at 785.

77. *Id.*

78. *Id.* at 788.

79. *Id.* at 786.

80. *Id.*

81. *Critchfield*, 842 So. 2d at 785 (citing *Martinez v. Scanlan*, 582 So. 2d 1167 (Fla. 1991)).

82. *Reynolds v. State*, 842 So. 2d 46 (Fla. 2002).

83. *Id.*

84. See FLA. STAT. § 828.12 (2) (2003). Section 828.12(2) of the *Florida Statutes*, provides:

A person who intentionally commits an act to any animal which results in the cruel death, or excessive or repeated infliction of unnecessary pain or suffering, or causes the same to be done, is guilty of a felony of the third degree, punishable as provided in s. 775.082 or by a fine of not more than \$10,000 or both.

Id.

85. *Reynolds*, 842 So. 2d at 47.

of what elements follow and modify the word “intentionally” is one that comes up with some frequency in cases involving statutory construction.⁸⁶ In this case, the issue was whether it applied only to the commission of the act itself or to the result of a cruel death or the infliction of unnecessary pain or suffering.⁸⁷ The court distinguished the language in this statute from one where the adjective at issue was followed immediately by a list of nouns.⁸⁸ It also distinguished it from another animal cruelty statutory section that more clearly indicated that the mens rea element modified the result element in that provision.⁸⁹ The court also rejected the constitutional argument of the defendant that his due process rights were violated because it found that the statute did expressly have an intent requirement.⁹⁰ Although the statute is not a model of clarity in indicating the scope of the intent requirement, the court seems to have applied the best interpretation in this case, particularly when compared with the other animal cruelty statutory section noted.⁹¹

The court considered the sufficiency of the evidence produced in a burglary case in *D.S.S. v. State*.⁹² This case involved four juveniles who broke into Plant City High School, where they committed acts of vandalism and stole a number of items.⁹³ They were charged with burglary, criminal mischief, petit theft, and resisting an officer without violence.⁹⁴ D.S.S. argued that the state failed to prove its prima facie case by failing to show that the Hillsborough County School Board owned the building into which the defendants had illegally entered.⁹⁵ Although the court held that ownership of the building or structure is a material element of burglary, it also held that the ownership element is not the same as would be required in property law.⁹⁶ Rather, it argued that the “ownership” interest was possessory in nature; thus, protecting “any possession which is rightful as against the burglar and is satisfied by proof of special or temporary ownership, possession, or control.”⁹⁷ The court upheld the verdict, despite a failure by the state to provide

86. *Id.* at 49.

87. *Id.* at 48.

88. *Id.* (distinguishing *State v. Huggins*, 802 So. 2d 276 (Fla. 2001)).

89. *Id.* at 49 (comparing section 828.12(2) that provides: “A person who tortures any animal with intent to inflict intense pain, serious physical injury, or death upon the animal is guilty of a felony of the third degree . . .”).

90. *Reynolds*, 842 So. 2d at 51.

91. *Id.*

92. 850 So. 2d 459 (Fla. 2003).

93. *Id.* at 460.

94. *Id.*

95. *Id.* at 460–61.

96. *Id.* at 461.

97. *D.S.S.*, 850 So. 2d at 461 (quoting *In re M.E.*, 370 So. 2d 795, 797 (Fla. 1979)).

direct evidence of ownership of the building, by noting that there was considerable circumstantial evidence of possession of the school building, including references to the high school by various witnesses.⁹⁸ Although it appears that the court properly upheld the verdict, it serves as a warning to attorneys to be careful about neglecting to provide evidence on a material element, even if the material element seems to be undisputed.

Another situation involving alleged sloppiness in producing evidence arose in the case of *Glover v. State*.⁹⁹ In this case, Bruce Glover was charged with capital sexual battery under section 794.011(2)(a) of the *Florida Statutes*.¹⁰⁰ Glover argued on appeal that the instructions given to the jury were defective because the trial court did not specifically instruct the jury that the age of the defendant was a material element of the case.¹⁰¹ The Supreme Court of Florida resolved a conflict amongst the district courts by holding that the age of the defendant is a material element.¹⁰² However, it upheld Glover's conviction by holding that the proof of his age was not disputed where the thirty-seven year old defendant sat in the courtroom and the booking admission that he was born in 1964 was admitted into evidence and not disputed.¹⁰³

The Supreme Court of Florida considered the application of the term "carried" in Florida's robbery statute,¹⁰⁴ in *State v. Burris*.¹⁰⁵ The case involved Daniel Burris, who reached out the window of his pickup truck and grabbed the victim's purse while he was driving past her, knocking her off her feet and dragging her along the pavement.¹⁰⁶ The relevant statute in this case enhanced the charge from a second-degree to a first-degree felony, because the accused carried a deadly weapon while committing the robbery.¹⁰⁷ The court rejected an opinion by the First District Court of Appeal that interpreted "carried" to be synonymous with "possessed."¹⁰⁸ The Supreme Court of Florida applied the commonly ascribed definition to "carry" in this statute,

98. *Id.* at 462.

99. 863 So. 2d 236 (Fla. 2003).

100. *Id.* at 237.

101. *Id.*

102. *Id.* at 238.

103. *Id.* at 237.

104. See FLA. STAT. § 812.13 (2003). Section 812.13 of the *Florida Statutes* provides: "(1) 'Robbery' means the taking of money or other property . . . from the person or custody of another . . . (2)(a) If in the course of committing the robbery the offender carried a firearm or other deadly weapon" § 812.13.

105. 875 So. 2d 408 (Fla. 2004).

106. *Id.* at 409.

107. *Id.*

108. *Id.* at 410 (citing *Jackson v. State*, 662 So. 2d 1369, 1371-72 (Fla. 1st Dist. Ct. App. 1995)).

looking to dictionary definitions to buttress its common sense interpretation that carrying generally means holding, supporting, or bearing.¹⁰⁹ As the court noted, automobiles generally carry people as opposed to people carrying automobiles.¹¹⁰ It also looked to the legislature's intent in using this term, which it perceived to be to deter robbers from bringing portable instruments to a robbery for the purpose of inflicting harm.¹¹¹ Furthermore, although it noted that automobiles have been deemed deadly weapons in other criminal statutes, it would require an improperly broad inference in this provision, in violation of the court's duty to resolve ambiguous provisions in favor of the defendant under the statutory rules of lenity.¹¹²

The *State v. Castillo*¹¹³ case involved a police officer accused of seeking or accepting unauthorized benefits in return for nonperformance of his official duty under section 838.016(1) of the *Florida Statutes*.¹¹⁴ In this case, the officer stopped a motorist for speeding and driving while intoxicated.¹¹⁵ According to the victim, the officer asked her to follow him in her car to a deserted warehouse area, where he proceeded to engage in vaginal intercourse with her.¹¹⁶ The Third District Court of Appeal had reversed the conviction because there was no evidence of a specific agreement stated by the parties that arrest would not occur if the victim had sex with him.¹¹⁷

As noted by the court, the statute is silent on the type of proof required to show that the statute had been violated.¹¹⁸ However, it reasonably held that an express agreement should not be required lest defendants evade conviction by avoiding the making of explicit promises.¹¹⁹ It went further by rejecting the argument that even an implicit agreement was required since the statute also criminalized the solicitation of a benefit.¹²⁰ It thus held that corrupt intent was sufficient to support a conviction.¹²¹ The latter statement is probably an overstatement of the court's true intentions because even a solicitation involves more than mere intent, and to permit conviction on intent alone would violate one of the basic tenets of criminal law in that crimes

109. *Id.* at 412.

110. *Burris*, 875 So. 2d at 412.

111. *Id.*

112. *Id.* at 415 (citing FLA. STAT. § 775.021(1) 2003)).

113. 877 So. 2d 690 (Fla. 2004).

114. *Id.* at 691.

115. *Id.*

116. *Id.*

117. *Id.* at 692.

118. *Castillo*, 877 So. 2d at 693.

119. *Id.* (citing *State v. Gerren*, 604 So. 2d 515, 520 (Fla. 3d Dist. Ct. App. 2002)).

120. *Id.* at 694.

121. *Id.* at 695.

must have at least some type of actus reus requirement.¹²² Nonetheless, it does seem an appropriate interpretation to hold that the statute does not require an agreement.¹²³ The court found that the circumstantial evidence in this case was more than adequate here to support the police officer's conviction.¹²⁴

VI. CONCLUSION

As can be seen by this review, the Supreme Court of Florida has not issued any opinions in the past two years that seem to radically alter settled criminal law principles in this jurisdiction. The battle over the proper interpretation of Florida's burglary statute continued during the past two years and is reflective of an ongoing debate with the state legislature over the difference between interpretation of the law and creating law. In most of the substantive criminal areas addressed by the supreme court, Florida's criminal law, and its interpretation by its highest court seems to be in line with the approach taken by most American jurisdictions at this point in time.

122. *Id.*

123. *Castillo*, 877 So. 2d at 695.

124. *Id.* at 696.

2004 SURVEY OF FLORIDA PUBLIC EMPLOYMENT LAW

JOHN SANCHEZ*

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I. INTRODUCTION

This survey article aims at conveying a sense of key developments and events in public sector labor and employment law during 2003–2004. While the focus is on Florida and the public sector, this article also mingles federal legislation and case law that affects Florida public employment. Major Eleventh Circuit cases, even if they originate in Georgia or Alabama, are included because such precedents are equally binding in Florida.

Part II highlights developments involving the hiring phase of employment, such as background checks of prospective employees and summarizes federal and state legislation aimed at restricting genetic and HIV screening. Privatization and outsourcing—trends that began in earnest during the 1980s in an effort to downsize government and cut costs—remain ripe topics today. Part II also covers conflicts of interest regulation, the ease with which discharged police officers are rehired, and claims that a state judge illegally resides far from the bench where he sits.

Part III, terms of employment, begins by summarizing landmark regulations that took effect August 23, 2004, which radically overhauled overtime rules for millions of employees, including police officers and firefighters. Other wage issues are also covered, such as proposed amendments of the Equal Pay Act¹ and teachers' salaries. Part III also covers key developments in employee benefits, from public pension plans and health insurance to family medical leave, workers' compensation, and unemployment compensation. In addition, Part III touches on new ways of conducting drug tests on public employees and privacy concerns raised by employees' e-mail. This section concludes with a look at health and safety concerns and a miscellany of other hard-to-categorize workplace issues.

Part IV takes a look at constitutional challenges public employees may raise, primarily free speech and due process issues. The heart of Part IV, however, deals with employment discrimination. Additionally, Part IV not only discusses such staples as race, sex, and religious bias claims commonly

1. Equal Pay Act of 1963, 29 U.S.C. § 206 (2000).

addressed under Title VII of the Civil Rights Act of 1964², but other forms of discrimination such as age and disability arising under separate federal statutes. Moreover, this section summarizes the number of cities and states that offer protection for gay and lesbian workers. Part IV concludes appropriately with a glance toward remedies, where proposed federal legislation, if enacted, would amend the Federal Arbitration Act³ to exclude employment contracts and would eliminate altogether the existing cap on damages recoverable for violations of Title VII.

II. HIRING, PRIVATIZATION, SCREENING, ETHICS, & RESIDENCE

A. *Background Checks and Genetic and HIV Screening*

While privacy concerns are always at stake whenever public employees come under scrutiny, the constitutionality of background investigations has been upheld. Nevertheless, eighty-five percent of all employers do no investigate prospective employees.⁴

As a practical matter, employers are advised to conduct background investigations as a strategy for avoiding liability stemming from negligent hiring. In 2003, Florida's juvenile justice chief implemented a plan to weed out convicted felons who supervise delinquent youths.⁵ In place of the current five-year screenings, the new policy screens all juvenile detention workers annually for arrests.⁶ A study conducted by the Miami Herald revealed that about 350 out of 2000 detention workers and supervisors statewide have arrest records.⁷ Among other proposals, the department will require employees to sign forms agreeing that they must alert the department of an arrest, or else be fired.⁸ Moreover, the department is drafting a psychological test to screen out candidates prone to excessive use of force.⁹ In 2004, a Florida State House committee adopted a bill that would require public agencies to

2. See Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-2000h-6 (2000).

3. See 9 U.S.C. §§ 1-307 (2000).

4. Beatrice Garcia, *Background? Check It Out*, MIAMI HERALD, Oct. 12, 1999, at 1C. But, after the 9/11 terrorist attacks, far more employers are conducting background checks as a routine matter. Eve Tahmincioglu, *Tense Employers Step Up Background Checks*, N.Y. TIMES, Oct. 3, 2001, at C9.

5. Tina Cummings & Carol Marbin Miller, *Detention Workers to Have Yearly Arrest Screenings*, MIAMI HERALD, Dec. 11, 2003, at 1B.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

undertake a background check of anyone who works or volunteers at parks, playgrounds, child care centers, or other venues where children meet.¹⁰

Another emerging form of screening that employers sometimes conduct at the hiring stage is known as genetic testing. The aim of this type of testing is to identify employees who may be prone to disease. While there are salutary reasons to conduct genetic testing, such as monitoring the impact of employee exposure to workplace toxins, it can also be enlisted to weed out disease-prone applicants in an effort to reduce health costs. Public employees have successfully contested genetic testing on constitutional grounds, arguing that it is a due process violation and an unreasonable search and seizure.¹¹

Legislative efforts at the federal level have aimed at restricting the use of genetic screening. On October 14, 2003, the United States Senate passed a bill that prohibits employers from relying on individuals' genetic data when making hiring, firing, job assignment, or promotion decisions.¹²

Like genetic testing, screening for HIV can be motivated by salutary or harmful purposes. Under Florida law, HIV test results may "not be used to determine if a person may be insured for disability, health, or life insurance or to screen or determine suitability for, or to discharge a person from, employment."¹³

Among other things, the Fair Credit Reporting Act¹⁴ regulates the information that can be collected by investigators while conducting background checks on job applicants.¹⁵ Under the Act, employers must notify the targeted applicant or employee before conducting an investigation that enlists outside investigators, secure the individual's prior consent, and fully disclose investigative reports before disciplining an employee.¹⁶ In other words, "an employee or job applicant can't be investigated for any wrongdoing—including sexual harassment—without the target's permission."¹⁷ Employers have asked Congress to exempt some employee investigations from the prior-approval rule, in addition to those probes involving employee misconduct and violations of state or federal laws.¹⁸

10. *Child Protection: Background Checks Urged for Workers*, MIAMI HERALD, Mar. 17, 2004, at 9B.

11. *See Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1275 (9th Cir. 1998).

12. *See* S. 1053, 108th Cong. § 202 (2003).

13. FLA. STAT. § 381.004(4)(d) (2003).

14. *See* Fair Credit Reporting Act, 15 U.S.C. §§ 1681–1681u (2000).

15. Kathy M. Kristof, *Credit Reporting Act Would Null Tough State Laws*, L.A. TIMES, Nov. 30, 2003, at C3.

16. *See* §§ 1681–1681u.

17. Kristof, *supra* note 15.

18. *Id.*

B. Privatization and Outsourcing

One of the definitions of privatization is “[t]he contracting out of functions previously performed by government to one or more private providers.”¹⁹ The 1980s witnessed a dramatic increase in contracting out of public services, ranging from janitorial services and garbage collection to school and prison administration.²⁰ Despite this trend, one occupation where the reverse is true, i.e. private jobs turning public, involves airport security, which came about largely due to 9/11.

When it comes to other airport positions, however, the pressure has been toward privatization.²¹ For example, the Bush Administration vowed in 2003 to veto an aviation bill unless the Federal Aviation Administration (FAA) was authorized to let private operators manage government-run air traffic control towers.²² This issue of whether air traffic controllers should be public or private employees goes back to 1981 when President Reagan fired striking controllers.²³ A union representing controllers sued the government in an Ohio federal court, alleging that privatizing control towers is illegal.²⁴ Some claim that the FAA’s goal of staffing small control towers with privately employed workers will reduce safety.²⁵ The FAA looks to save one million dollars per private tower.²⁶ Today 219 of the 484 public airports have contracted with private controllers.²⁷ President Bush has steadily chipped away at President Clinton’s Executive Order protecting air traffic controllers from privatization.²⁸

Long waits at airports have led to some in Congress to call for privatizing airport security screeners.²⁹ Orlando’s airport has faced persistent problems adjusting staffing to meet demand, and Miami International Airport is seriously considering privatizing its screening positions.³⁰ Congress has

19. Brian Clemow, *Privatization and the Public Good*, 43 LAB. L.J. 344 (1992).

20. See, e.g., Ira P. Robbins, *Privatization of Corrections: Defining the Issues*, 33 FED B. NEWS & J. 194 (1986) (discussing the new emerging concept of privatization of correctional facilities, also known as “prisons for profit”).

21. Leslie Miller, *Controllers, Government Revive Old Dispute*, MIAMI HERALD, Sept. 25, 2003, at 7A.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. Miller, *supra* note 21.

27. *Id.*

28. *Id.*

29. Leslie Miller, *Airports May Dump Federal Workers*, MIAMI HERALD, Mar. 26, 2004, at 1C.

30. *Id.*

given airports the option of returning to private screening.³¹ The Jacksonville Airport Authority, plagued by too many managers, and too few screeners, is likely to opt out of government screening entirely.³²

In the face of budget shortfalls, privatizing city services is often seen as an obvious way of saving money.³³ Fort Lauderdale, for example, is considering hiring a security company to respond to home alarms, instead of relying on city police.³⁴ In addition, the city is assessing whether to contract-out utility bill collections and management of city pools.³⁵ Parking enforcement, the city's most profitable enterprise, is the least likely candidate for privatization.³⁶

Two synonyms for privatization, outsourcing and offshoring, have fueled debate as American jobs continue to disappear at home, and reappear overseas. By one estimate, at least fifteen percent of the three million jobs lost in the United States since 2000 have been outsourced to foreign markets.³⁷ As public resentment against outsourcing has mounted, federal and state legislatures have proposed measures to reduce the practice.³⁸ In Florida, critics of outsourcing argue that the state should not do business with companies that outsource their labor needs to foreign workers.³⁹ To date, however, bills requiring state contractors to hire U.S. workers have not become law.⁴⁰ In 1996, the Florida Department of Children and Families turned to a private company to end the agency's reliance on paper food stamps and welfare checks—saving the state four million dollars a year.⁴¹ Similarly, in 2000, the state contracted with a company that subcontracts in India to identify “welfare fraud and mistakes.”⁴² Despite the fact that these services have never been performed by state employees, Florida has continually laid-off state employees who deal with welfare and food stamps programs.⁴³

31. *Id.*

32. *Id.*

33. See, e.g., Natalie P. McNeal, *Mayor Brings Up the Possibility of Privatizing Some City Services*, MIAMI HERALD, Feb. 26, 2004, at 5B.

34. *Id.*

35. *Id.*

36. *Id.*

37. Louis Uchitelle, *A Statistic that's Missing: Jobs that Moved Overseas*, N.Y. TIMES, Oct. 5, 2003, at A20.

38. David Streitfeld, *Indian City Rides Tech Euphoria*, L.A. TIMES, June 30, 2004, at A1.

39. Kathleen Chapman, *State Hot Line Takes Callers Around World*, MIAMI HERALD, May 10, 2004, at 8B.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

C. Ethics

Federal law prohibits presidential appointees from commenting on potential employment with companies doing business with, or hoping to be doing business with agencies headed by those officials.⁴⁴ In January 2004, the White House made a change in ethics rules by ordering all federal agencies to no longer issue ethics waivers that enable presidential appointees to negotiate positions with private firms while they are managing federal policies vital to the potential employers.⁴⁵ The move was portrayed as an “effort to strengthen government ethics.”⁴⁶

Most states have enacted so-called codes of governmental ethics.⁴⁷ In 2003, “44 states required their employees to undergo ethics training . . . [b]ut only 16 states make such training mandatory.”⁴⁸ Public officials are held to a higher standard of ethics than rank and file public employees on grounds that the former owe a fiduciary duty to the electorate.⁴⁹ “[A]ll 50 states regulate the conduct of their public officials”⁵⁰

In Florida, a variety of government ethics issues have arisen recently, from a state supreme court ruling on the definition of bribery of a government official,⁵¹ to an ethics law forcing “government officials to publicly disclose gifts they receive” from non-relatives.⁵²

The Supreme Court of Florida case involved a police officer who was convicted of unlawful compensation, i.e. a form of bribery, for letting a female drunk driver go free after having sex with her.⁵³ Because the police officer never explicitly said he would arrest her if she refused to have sex with him, the Third District Court of Appeal reversed the officer’s conviction.⁵⁴ On appeal, the state high court unanimously overturned this decision, ruling that prosecutors need not prove public officials talked explicitly about a quid pro quo to convict them.⁵⁵ Circumstantial evidence of intent is suffi-

44. Amy Goldstein, *White House Halts Job-Hunting Waivers*, MIAMI HERALD, Jan. 15, 2004, at 9A.

45. *Id.*

46. *Id.*

47. See P. J. Huffstutter, *Illinois Takes on Its Culture of Scandal*, L.A. TIMES, Apr. 4, 2004, at A24.

48. See *id.*

49. *Id.*

50. *Id.*

51. State v. Castillo, 877 So. 2d 690 (Fla. 2004).

52. Scott Andron, *Gift Law Confusing, Experts Say*, MIAMI HERALD, Feb. 8, 2004, at 1B.

53. Jay Weaver, *Burden of Proof Lightened*, MIAMI HERALD, Apr. 23, 2004, at 5B.

54. *Id.*

55. *Id.*

cient: there need be no spoken understanding to show a gift was exchanged for a favor.⁵⁶

Part of Florida's ethics law regulates gift-giving to government officials.⁵⁷ The gift law aims at limiting gifts to public officials from lobbyists, developers, or city contractors, and at making public any gifts officials receive from others so that voters can assess their propriety.⁵⁸ But experts who know the law say it is confusing and often disregarded.⁵⁹ For example, are paid trips that mix business with pleasure gifts that must be disclosed to the Florida Commission on Ethics? Opinion varies.⁶⁰ The law has other shortcomings as well, for example, it shifts the burden of reporting minor gifts from lobbyists, not on the public official, but on the gift-giver.⁶¹ Voters learn the name of the lobbyist but not the official who received the gift.⁶² Thus, public oversight of official conduct is compromised.

D. *Rehiring Fired Employees*

In 2002, the Broward Sheriff's Office recommended the discharge of fifty police officers for an array of misconduct "ranging from drug use to false imprisonment to improper display of a firearm."⁶³ A dismissed officer can trigger a grievance procedure, but even if he loses, the officer is entitled to a full due process hearing before an arbitrator.⁶⁴ Even if the arbitrator sustains the dismissal, the officer is still free to seek a job as a police officer elsewhere, unless he is decertified by the Florida Department of Law Enforcement.⁶⁵

While the burden of proof at arbitration is by preponderance of the evidence, there must be clear and convincing evidence before an officer's license is revoked.⁶⁶ According to a study undertaken by the Miami Herald, many fired police officers are rehired, either involuntarily forced upon a department by an arbitrator or voluntarily hired by another city.⁶⁷ A strong

56. *Id.*

57. Andron, *supra* note 52.

58. *Id.*

59. *Id.*

60. *See id.*

61. *Id.*

62. Andron, *supra* note 52.

63. Wanda J. DeMarzo & Daniel de Vise, *In BSO, Fired Officers Routinely Rehired*, MIAMI HERALD, Sept. 29, 2003, at 14A.

64. *Id.*

65. *Id.*

66. *Id.*

67. *See id.*

police union, which zealously defends its members, and a grievance procedure, that tilts in favor of officers, is blamed for this result.⁶⁸

Several Florida police departments have turned to early intervention systems to identify bad police officers or those with potential problems.⁶⁹ Such systems have turned up a surprising predictor: that many officers in trouble have exhausted not only their “sick leave, [but also their] vacation and compensatory time.”⁷⁰

E. *Residence*

There is a growing trend toward establishing residency requirements for public employment on the assumption that employees should have a stake in the economic health of the community from which they draw their salaries. These requirements will play a vital role in addressing economic and social issues of the communities in which residents earn their livelihood. Residency is often defined as a person’s permanent place of abode.⁷¹ Proof of residency can range from receipt of mailing, to voter registration or utility statements.⁷² Proof of residency ensures against workers maintaining a phantom address within one city, for example, while the family and the employee actually reside in another.⁷³

These factors governing residency came into play in Florida in 2003 with regard to a Third District Court of Appeal’s judge who was accused of illegally living four hundred miles north of the bench upon which he sat.⁷⁴ The allegation was that the judge and his family lived in Gainesville while he decided appellate cases in Miami-Dade and Monroe counties.⁷⁵ While the judge held a one-third interest in a condominium on Miami Beach and had avowed that the Miami address was his permanent homestead for property tax purposes,⁷⁶ the legal question boiled down to whether there was intent to make the Miami condo his actual residence.

68. See Demarzo & de Vise, *supra* note 63 (stating they found “case after case of fired officers who were promptly rehired”).

69. Wanda J. DeMarzo & Daniel de Vise, *Cities Turn to Early Intervention*, MIAMI HERALD, Sept. 29, 2003, at 14A.

70. *Id.*

71. BLACK’S LAW DICTIONARY 1335 (8th ed. 2004).

72. See *id.*; see also *Steinhardt v. Batt*, 753 So. 2d 928, 930–31 (La. Ct. App. 2000) (stating that defendant had acquired residency from receipt of mailing and utility bills).

73. See *id.*

74. *Critic Says Judge Has Illegal Residence*, MIAMI HERALD, Sept. 11, 2003, at 3B.

75. *Id.*

76. *Id.*

III. TERMS OF EMPLOYMENT

A. *Hours and Wages*

1. Fair Labor Standards Act

Under the Fair Labor Standards Act, the rule of thumb in the public sector is that employees who work over forty hours a week are entitled either to time-and-a-half pay or to compensatory time off.⁷⁷ The largest category of employees who are exempt from overtime pay are salaried workers in certain executive, administrative, or professional posts.⁷⁸ Under regulations that have not been revised in fifty years, many inequities and criticisms have emerged.⁷⁹ For example, “[t]he pay level below which [employees] are automatically eligible for overtime pay” has stagnated at \$8060, leaving some assistant managers, with salaries of around \$20,000, ineligible for overtime pay, even if they put in sixty hour weeks.⁸⁰ Moreover, critics claimed the regulations were so unclear that they generated a flood of litigation.⁸¹

In response to growing criticism and increasing litigation over archaic overtime rules, the Bush Administration issued draft regulations in 2003 aimed at modernizing and simplifying rules governing over one hundred million employees.⁸² The proposed rules, over five hundred pages long, prompted an excess of seventy-five thousand e-mail messages and letters commenting on the draft.⁸³ A fairly non-controversial feature of the draft involved raising the threshold below which employees are automatically eligible for overtime pay from \$8060 to \$23,660.⁸⁴ A controversial feature of the draft was the proposal to disqualify virtually every employee earning over \$65,000 a year for overtime pay.⁸⁵ Under the old rules there was no ceiling.⁸⁶ Moreover, critics claimed it was unclear which employees earning between the floor and the ceiling in the new rules would be eligible for overtime pay.⁸⁷ Police officers and fire fighters, among other higher-paid blue-

77. Steven Greenhouse, *Labor Dept. Revises Plans to Cut Overtime Eligibility*, N.Y. TIMES, Apr. 21, 2004, at A14.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. Greenhouse, *supra* note 77.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. Greenhouse, *supra* note 77.

collar employees, feared that the proposed rules rendered them ineligible for overtime pay.⁸⁸ All told, critics claimed the proposed rules threatened overtime pay for as many as eight million employees.⁸⁹ In the United States, a corporate tax bill was delayed by Democrats who insisted that the proposed overtime rules leave those workers currently entitled to overtime pay as eligible.⁹⁰

In response to these pressures and criticisms over the draft, the Labor Department issued revisions that have only partially allayed concerns.⁹¹ For one thing, in April 2004 the Secretary of Labor made clear that police officers and firefighters would still qualify for overtime pay.⁹² For another, the revisions increased from \$65,000 to \$100,000, the amount that would almost automatically disqualify a worker from overtime pay.⁹³ Only white-collar workers covered by a union contract that ensures overtime pay for those earning over \$100,000 would continue to be eligible.⁹⁴ Despite these concessions, it still took a vote in the Senate on May 4, 2004, to guarantee the right to overtime pay for all employees who are currently eligible.⁹⁵ The revised overtime pay regulations go into effect August 23, 2004.⁹⁶ It will be miraculous if the five hundred page document does not generate its share of litigation.

Apart from federal overtime pay overhaul, there were three noteworthy Eleventh Circuit Court decisions that were handed down over the last year that bear on the Fair Labor Standards Act (FLSA).⁹⁷ Two involve FLSA collective actions⁹⁸ and the third deals with FLSA remedies.⁹⁹

Under the FLSA, a group of employees are entitled to sue to recover wages even though such a suit is not, strictly speaking, a class as defined in rule 23 of the *Federal Rules of Civil Procedure*.¹⁰⁰ The difference is that an

88. *Id.*

89. Mary Dalrymple, *Tax Bill Stalls; OT Pay Tariffs at Issue*, MIAMI HERALD, Mar. 25, 2004, at 3A.

90. *Id.*

91. Greenhouse, *supra* note 77.

92. *Id.*

93. *Id.*

94. *Id.*

95. David Espo, *Senate Opposes OT-Rule Changes*, MIAMI HERALD, May 5, 2004, at 3C.

96. Harry Wessel, *OT May Fatten Adjusters' Pay*, ORLANDO SENTINEL, Sept. 11, 2004, at C1.

97. *Prickett v. DeKalb County, Ga.*, 349 F.3d 1294 (11th Cir. 2003); *Cameron-Grant v. Maxim Healthcare Servs., Inc.*, 347 F.3d 1240 (11th Cir. 2003); *Barragan v. LCT Transp. Servs., Inc.*, No. 02-15542-HH, 2002 WL 32172203, at *2 (11th Cir. Dec. 10, 2002).

98. *Prickett*, 349 F.3d at 1249; *Cameron-Grant*, 347 F.3d at 1240.

99. *Barragan*, 2002 WL 32172203, at *2.

100. 29 U.S.C. § 216(b) (1998).

employee must opt-in to become a member of a FLSA class, while a member of a rule 23 class must request exclusion to avoid becoming a member.¹⁰¹ In *Cameron-Grant v. Maxim Healthcare Services Inc.*,¹⁰² the Eleventh Circuit ruled that a named plaintiff in a FLSA collective action cannot alert other class members of a possible case after his own claims have been settled.¹⁰³ In *Prickett v. DeKalb County, Georgia*,¹⁰⁴ the court ruled that opt-ins to a FLSA collective action need not file additional consent forms when an additional FLSA claim is added to a case.¹⁰⁵

The third Eleventh Circuit case involved the awarding of attorneys' fees under the FLSA.¹⁰⁶ The only time a prevailing employer is entitled to recover attorneys' fees under the Act is when the employee acted in bad faith.¹⁰⁷ In *LCT Transportation Services, Inc. v. Barragan*,¹⁰⁸ the court ruled that an employer must identify a specific Department of Labor opinion to establish a good faith defense.¹⁰⁹ Under the FLSA, the amount of reasonable attorney's fees is left to the sound discretion of the trial court.¹¹⁰ In *Barragan*, the court also recognized that in assessing attorneys' fees the court may exclude compensation for excessive hours and may take into account the fact that the litigation was decidedly vexatious.¹¹¹

2. Equal Pay Act

The Equal Pay Act (EPA) guarantees that men and women performing substantially the same work are paid equally.¹¹² Under the EPA, employees may bring suit only for back wages and for liquidated damages (plus attorneys' fees and court costs).¹¹³ But under proposed federal legislation, the Civil Rights Act of 2004, the EPA would be amended to provide for com-

101. See, e.g., *Kinney Shoe Corp. v. Vorhes*, 564 F.2d 859, 862 (9th Cir. 1977).

102. 347 F.3d 1240 (11th Cir. 2003).

103. *Id.* at 1249.

104. 349 F.3d 1294 (11th Cir. 2003).

105. *Id.* at 1298.

106. *Barragan*, 2002 WL 32172203, at *2.

107. 48 AM. JUR., *Labor and Labor Relations* § 4705 (2004) (citing *McBride v. Cox*, 567 N.E.2d 130, 134 (Ind. Ct. App. 1991)).

108. No. 03-3, 2003 WL 22428397, at*1 (June 25, 2003).

109. *Id.* at *12-13.

110. 29 U.S.C. § 216(b) (2003).

111. *LCT Transp. Servs., Inc. v. Barragan*, No. 03-293, 2003 WL 22428892, at *9 (Aug. 20, 2003).

112. 29 U.S.C. § 201 (2004).

113. *Id.*

pensatory and punitive damages and would bar employers from retaliating against employees who share wage information.¹¹⁴

3. Public Employee Wages

Studies undertaken over the last year have uncovered significant wage gaps. Nationally, women continue to lag behind men, earning twenty percent less than men.¹¹⁵ Closer to home, Florida's average wage is only eighty-seven percent of the national average and about forty percent of Florida's workers earn less than nine dollars per hour.¹¹⁶ To counter these trends, a coalition, Floridians For All, aims to raise the state minimum wage to \$6.15 per hour.¹¹⁷ An estimated three hundred thousand state workers would receive an immediate wage increase.¹¹⁸ At the high end of the income spectrum, a review of Florida's payroll records revealed that nine presidents of state public universities earned more than \$250,000 in 2003.¹¹⁹ Despite these high salaries they remain below the national average, of course many state university athletic coaches earn far more, but the bulk of their pay comes from outside sources.¹²⁰

In 2003, budget cuts in Fort Lauderdale led not only to the freezing of police officer's salaries, but also to layoffs, early retirements, and an abrupt halt in hiring.¹²¹ Other public employees have fared better than Fort Lauderdale police officers when it comes to wages. In a controversial move Miramar city commissioners gave themselves a raise for the third time in three years.¹²² However, in fairness it should be mentioned that the new salaries are comparable to what commissioners in other Southwest Broward cities earn.¹²³

Under a plan hotly contested by the state's second-largest public employee labor union (because it rewards junior employees more than veteran

114. H.R. 3809, 108th Cong. § 603 (2004); S. 088, 108th Cong. § 603 (2004).

115. *Study Finds Women Still Earn 20% Less than Men*, MIAMI HERALD, Nov. 21, 2003, at 3C.

116. Gregg Fields, *Economic Diversity Lacks State Support, Leaders Say*, MIAMI HERALD, Sept. 5, 2003, at 1C.

117. Gregg Fields, *Hike in Minimum Wage Sought*, MIAMI HERALD, Oct. 23, 2003, at 3C.

118. *Id.*

119. Brent Kallestad, *University Leaders Among Highest Paid*, MIAMI HERALD, Feb. 23, 2004, at 8B.

120. *Id.*

121. Ashley Fantz, *Police Will Ax 42 Jobs, Shave \$6.3 Million*, MIAMI HERALD, Nov. 12, 2003, at 1B.

122. Natalie P. McNeal, *Miramar Leaders Seek Pay Hike Again*, MIAMI HERALD, Aug. 26, 2003, at 3B.

123. *Id.*

employees) hefty pay raises were proposed for three thousand employees who investigate child abuse or supervise children in foster care.¹²⁴ As is often the case, the goal is to bring the salaries of these public employees up to the national average.¹²⁵

The final category of public employees whose wages are always widely publicized is that of public school teachers. The Miami-Dade school district awarded teachers not only two years' worth of raises, but also reduced their health insurance costs.¹²⁶ In February 2004, Broward County approved a contract giving teachers a nine percent raise over three years.¹²⁷ Moreover, the contract includes "[a] \$6000 incentive over three years for employees to move from a PPO to an HMO healthcare provider."¹²⁸

B. *Public Employee Pension Plans*

Many state and local governments, up against daunting pension obligations to public employees, have turned to selling bonds to keep their pension funds solvent.¹²⁹ Bond sales are attractive because they deliver ready cash, relieving budget pressures without added tax increases or cuts in retirement benefits.¹³⁰ The downside is that the strategy can fail, leaving taxpayers to pick up the tab.¹³¹ For example, in California an unpopular bond sale for state employees' pension played a part in the recall of Governor Gray Davis.¹³² In 2003, Pembroke Pines, Florida borrowed forty-five million dollars to fund a new pension plan for city firefighters.¹³³ The city will borrow the money through a bond issue, promising to repay the debt by tapping in-

124. Carol Marbin Miller, *Welfare Workers' Raise Upsets Union*, MIAMI HERALD, Sept. 6, 2003, at 5B.

125. *Id.*

126. Matthew I. Pinzur, *Teachers, Aides to Get Sizable Raises*, MIAMI HERALD, Nov. 11, 2003, at 5B.

127. Mary Ellen Flannery, *Teachers OK Deal, but Some Still Upset*, MIAMI HERALD, Feb. 11, 2004, at 9B.

128. Steve Harrison & Mary Ellen Flannery, *Teachers Reach Deal on Raises; If the New Contract Deal is Formalized, Broward Teachers Would Get a Retroactive 3 Percent Raise for This Year*, MIAMI HERALD, Jan. 28, 2004, at B1.

129. Mary Williams Walsh, *States and Cities Risk Bigger Losses to Fund Pensions*, N.Y. TIMES, Oct. 12, 2003, at A1.

130. *Id.*

131. *Id.*

132. *Id.*

133. Scott Andron, *Bond Issue to Fund Pensions; The City is Going To Borrow Millions of Dollars, Not For a Bricks-and-Mortar Project, But To Increase Firefighter Benefits*, MIAMI HERALD, Sept. 18, 2003, at 2B.

come from consumers' utility taxes.¹³⁴ While risky, the bond issue will enable fire fighters to retire on eighty percent pay after twenty years.¹³⁵

Florida's public pension fund, the fourth-largest in the United States, gained national attention on two matters in the past year. In 2003, federal auditors concluded that "Florida's public pension fund owe[d] the U.S. Department of Health and Human Services \$267 million" for excessive pension benefits paid to Florida employees who worked in federally funded programs.¹³⁶ In March 2004, the Florida pension plan joined a dozen other large investors in pledging to vote against Chairman Michael Eisner's reelection to the Walt Disney Board of Directors.¹³⁷ Despite this opposition, Eisner retained his seat.

Pension plans come in two types: defined benefit and defined contribution. Most public employee pension funds are defined benefit plans. Under such a plan, upon retirement an employee is entitled to a fixed share of her salary multiplied by the number of years of service. While in the last ten years, over seventeen thousand private employers have discontinued defined benefit plans, one of the few new plans was set up in 2003 for the police and firefighters of Lighthouse Point, Florida.¹³⁸

Under many public pension plans, pension benefits received by the surviving spouse of a deceased plan member are terminated if he or she remarries. Arguably, this result prevents a surviving spouse from receiving benefits, which the decedent had earned over his or her working lifetime and penalizes surviving spouses who choose remarriage over widowhood. For example, in Fort Lauderdale, "widows whose spouses retired from the city before 1999" lose their survival benefits if they remarry.¹³⁹ This loss can be mitigated, some argue, by life insurance policies aimed at supporting surviving spouses.¹⁴⁰

Many public pension plans integrate the payment of disability benefits with workers' compensation, social security, or other employer-provided disability programs. In many cases, for example, the sum of workers' compensation and pension benefits cannot exceed one hundred percent of the

134. *Id.*

135. *Id.*

136. Joni James, *Audit: State Pension Fund Owes Feds \$267 Million*, MIAMI HERALD, Sept. 11, 2003, at 6B.

137. Claudia Eller, *Film Unit Caught in Crossfire; With Support for Eisner Eroding, 'The Alamo' and Other Big-Budget Bets Face Close Scrutiny*, L.A. TIMES, Mar. 2, 2004, at C1.

138. Mary Williams Walsh, *United Methodist Church Bucks the Trend on Employee Pensions*, N.Y. TIMES, May 21, 2004, at C1.

139. Ashley Fantz, *City Cool to Widows' Pension Plea*, MIAMI HERALD, Feb. 18, 2004, at 8B.

140. *Id.*

employee's salary at time of disability.¹⁴¹ Under an 1890 federal law, retirement pay for disabled veterans "is reduced by a dollar for every dollar received in disability compensation."¹⁴² United States House Minority Leader Nancy Pelosi, a California Democrat, is pushing to abolish this century-old tax policy.¹⁴³

Pursuant to an August 2002 opinion by the federal Equal Employment Opportunity Commission (EEOC), it is illegal age discrimination for state or local governments to bar a worker from membership in a defined benefit pension plan on grounds of the employee's age at time of hire.¹⁴⁴ In light of this opinion, Fort Lauderdale and its public employee union are scrambling to include previously excluded older workers in the pension plan.¹⁴⁵ In July 2003, the city amended its laws excluding hirees older than fifty-five from pension eligibility to open membership to all hirees regardless of age.¹⁴⁶ The city will pick up the cost of past contributions for those over fifty-five years of age formerly excluded by its illegal policy.¹⁴⁷

C. *Health Insurance*

In 2002, forty-four million people were without health insurance, bringing the proportion of Americans who were uninsured to fifteen percent, up from fourteen percent in 2001.¹⁴⁸ The number of full-time employees lacking health insurance rose by about nine hundred thousand dollars in 2002, equaling approximately twenty million dollars.¹⁴⁹ The figure for Florida is worse than the national average: seventeen and one-half percent of Florida's residents are uninsured.¹⁵⁰ The higher number of uninsured is blamed on the tepid economy, layoffs, and employers' increasing refusal to pay soaring health insurance rates.¹⁵¹ Average premiums rose almost fourteen percent in 2003, so more employers are shifting more of the costs onto their employees,

141. *Barragan v. City of Miami*, 545 So. 2d 252, 255 (Fla. 1989).

142. Mitch Stacy, *'Tax' on Disabled Vets Decried*, MIAMI HERALD, Nov. 12, 2003, at 10B.

143. *Id.*

144. Sonji Jacobs, *Fort Lauderdale Looking to Place Older Workers in City Pension Plan*, MIAMI HERALD, Aug. 26, 2003, at 3B.

145. *Id.*

146. *Id.*

147. *Id.*

148. Robert Pear, *Big Increase Seen in People Lacking Health Insurance*, N.Y. TIMES, Sept. 30, 2003, at A1.

149. *Id.*

150. Tony Pugh, *43 Million Lack Insurance*, MIAMI HERALD, Sept. 30, 2003, at 3A.

151. *Id.*

hiking co-payments and deductibles as well.¹⁵² Legislative efforts to expand coverage to the uninsured through the use of tax credits have languished in Congress.¹⁵³

One side effect of the rising cost of benefits, like health insurance, is that salaries are stagnating at the slowest wage growth in decades, according to one expert.¹⁵⁴ The cost of prescription drugs is rising even faster than that of health insurance.¹⁵⁵ In light of this development several state governments are turning to Canada, lured by the prospect of slashing prescription drug costs in half.¹⁵⁶ Florida officials, however, insist it is wrong to import drugs from Canada.¹⁵⁷ The toll that soaring healthcare costs have exacted is seen in Florida's public sector in other ways. Legislators have required public employees to pay higher premiums for health insurance and for the first time ever, even Florida's elected officials may be forced to pay for their coverage.¹⁵⁸

At age sixty-five, retirees become eligible for Medicare and the question arose whether an employer committed unlawful age discrimination by according such Medicare eligible retirees fewer health insurance benefits than those accorded non-Medicare eligible retirees.¹⁵⁹ In an effort to give guidance to employers caught in the middle of this issue, the EEOC issued a final rule on April 22, 2004 that allows employers to reduce or terminate health benefits once a retiree becomes eligible for Medicare, or similar state retiree health benefits, without committing unlawful age discrimination.¹⁶⁰ The new rule, critics claim, will fuel anxiety among the "[twelve] million Medicare beneficiaries who also receive health benefits from their former employers."¹⁶¹

152. Robin Toner, *Boiling Brew: Politics and Health Insurance Gap*, N.Y. TIMES, Sept. 30, 2003, at A27.

153. *Id.*

154. Marilyn Geewax, *Experts: Don't Expect a Big Raise*, MIAMI HERALD, May 7, 2004, at 1C.

155. *Id.*; see also Theresa Agovino, *Four States Mull Buying Canadian*, MIAMI HERALD, Oct. 14, 2003, at 1C.

156. Agovino, *supra* note 155.

157. *Id.*

158. Gary Fineout, *Florida Elected Officials Could Lose Key Benefit*, MIAMI HERALD, Mar. 30, 2004, at 7B.

159. *Erie County Retirees Ass'n v. County of Erie*, 220 F.3d 193, 196 (3d Cir. 2000).

160. Robert Pear, *Agency to Allow Insurance Cuts for the Retired*, N.Y. TIMES, Apr. 22, 2004, at A1.

161. *Id.*

D. *Family Medical Leave Act*

Under the Family and Medical Leave Act (FMLA),¹⁶² all state and local government eligible employees are entitled to twelve weeks of unpaid leave in a twelve-month period: 1) for birth or adoption of a child or placement of a foster child; 2) to care for a spouse, child, or parent with a serious health condition; or 3) for the employee's own serious health condition.¹⁶³ In *Russell v. North Broward Hospital*,¹⁶⁴ the Eleventh Circuit upheld a Department of Labor regulation interpreting "serious health condition" to require more than three consecutive full days of incapacity, rather than three consecutive partial days.¹⁶⁵

Those individually liable under the FMLA have been the subject of much debate. In determining whether supervisors or managers may bear individual liability under the FMLA, courts generally have concluded that the Act extends to all those who controlled, in whole or in part, the plaintiff's ability to take a leave of absence and return to her position.¹⁶⁶ When it comes to suing the federal government, however, the question of individual liability has divided the courts. The Sixth and Eleventh Circuit Courts, unlike the Eighth Circuit, have ruled that the FMLA bars individual liability suits against federal agency employers.¹⁶⁷

State and local governments have looked to the FMLA in shaping and extending either paid leave or other forms of unpaid leave for employees. Starting July 1, 2004, for example, California became the first state to provide six weeks of paid leave for family and medical emergencies.¹⁶⁸ Under a 1999 Miami-Dade County law, companies with fifty or more employees must offer up to thirty days of unpaid leave for victims of domestic violence.¹⁶⁹ Increasingly, employers are setting up formal domestic-abuse policies, some with paid time off and legal counseling.¹⁷⁰

Another emerging trend in the workplace that is aimed at strengthening families is the growing ranks of employers who provide some kind of adop-

162. 29 U.S.C. § 2601 (2000).

163. 29 U.S.C. § 2612 (2000).

164. 346 F.3d 1335 (11th Cir. 2003).

165. *Id.* at 1344.

166. *Waters v. Baldwin County*, 936 F. Supp. 860, 863 (S.D. Ala. 1996) (explaining that supervisors may be counted as employers if they exercised some control over employee's efforts to take FMLA leave).

167. *See, e.g., Mitchell v. Chapman*, 343 F.3d 811, 829 (6th Cir. 2003).

168. THEODORA LEE, EMPLOYMENT LAW UPDATE 2003-2004, at 113, 161 (PLI Patents, Copyrights, Trademarks, & Literary Property Course Handbook Series No. 774 2004).

169. D. E. Le' Ger, *A Helping Hand, Unclenched*, MIAMI HERALD, Oct. 2, 2003, at 3C.

170. *Id.*

tion benefit to their employees.¹⁷¹ On average, some employers give between “\$1,500 to \$10,000 in financial assistance and from one week to [twelve] weeks of paid time off.”¹⁷² While some employers maintain workplace policies that discourage employees from bringing their children to work on school holidays, others employers have “no problem with . . . employees taking their children to work on school holidays or when they’re sick.”¹⁷³

E. Drug Testing

The United States Supreme Court has made it clear that routine periodic drug testing of federal employees may be conducted without individualized suspicion or even absent suspicion of a drug problem whatsoever.¹⁷⁴ Because urine testing may require direct observation of urination to guarantee the reliability of the results, the federal government has cast about for less privacy-invasive means of drug testing of its employees. In April 2004, the federal government proposed testing the hair, saliva, and sweat of its 1.6 million employees in an effort to avoid the privacy issues surrounding urinalysis.¹⁷⁵ The new techniques will make it harder for workers to adequately prepare for, or to avoid, detection—even though since 1986 the positive rate for federal employees has declined to under one half percent from eighteen percent.¹⁷⁶

F. Computer Privacy

Many states have enacted so-called “Open Meetings Acts” which require that the public business be conducted in the open and not behind closed doors. At the same time, these statutes carve out classes of information, such as personal materials from public disclosure to protect the privacy rights of public employees . . .¹⁷⁷

171. Cindy Krischer Goodman, *More Firms Offering Adoption Help to Employees*, MIAMI HERALD, Nov. 19, 2003, at 1C.

172. *Id.*

173. Cindy Krischer Goodman, *More Dads Taking Kids to Work, Raising Familiar Gender-Gap Issue*, MIAMI HERALD, Feb. 11, 2004, at 1C.

174. Nat’l Treasury Employees Union v. Von Raab, 489 U.S. 656, 679 (1989).

175. Leigh Strope, *Feds Propose New Drug Tests*, MIAMI HERALD, Apr. 7, 2004, at 3A.

176. *Id.*

177. JOHN E. SANCHEZ & ROBERT D. KLAUSNER, STATE & LOCAL GOVERNMENT EMPLOYMENT LIABILITY, LIABILITY PREVENTION SERIES, § 6:15, at 6-39 (Thompson-West 2003).

Employee e-mail has raised its own set of privacy concerns.¹⁷⁸ The Supreme Court of Florida ruled in 2003 that public employees' personal e-mails contained on government computers are not "public records" which must be disclosed under the state's public records law.¹⁷⁹ By contrast, 541 e-mail messages between West Virginia Governor Bob Wise and a state employee, "with whom he may have been romantically involved," have been released to the public under the Freedom of Information Act.¹⁸⁰

G. *Workers' Compensation*

Florida's Workers' Compensation statute grants employees suffering from work-related injuries or illness medical and hospital benefits.¹⁸¹ The employer bears the burden of providing that any challenged medical treatment is unreasonable or unnecessary.¹⁸² In many "soft-tissue" workers' compensation cases, employers can be hard pressed to challenge the extent of an injury.¹⁸³ Emerging medical technology, however, may be able to prove whether workers are faking neck, back, and carpal tunnel injuries.¹⁸⁴ With workers' compensation insurance rates soaring, employers search for anything "that will allow them to keep costs down."¹⁸⁵ A test offering objective medical diagnostics would likely prompt employers to contest claims that presently go un-investigated.¹⁸⁶

Employees injured while commuting to work are ordinarily denied workers' compensation under the so-called "going-and-coming" rule.¹⁸⁷ The theory behind the rule is that the causal link between work and the injury is too attenuated and that hazards faced by commuters are merely the perils of ordinary life.¹⁸⁸ Injuries sustained in the course of meal breaks or the running of personal errands during the workday pose similar questions.¹⁸⁹ Under a bill approved by the Florida State Senate, all state law enforcement

178. *Id.* at 6-40.

179. *Florida v. City of Clearwater*, 863 So. 2d 149, 155 (Fla. 2003).

180. Bettijane Levine, *FYI: Yr E-mail Can Haunt U 4ever; A Word to the Unwary: Private Missives Don't Belong on the Internet*, L.A. TIMES, June 6, 2003, at E1.

181. FLA. STAT. § 440.09(1) (2003).

182. *Id.*

183. *See id.*

184. John Dorschner, *Machine May Stop Job-Injury Fakes*, MIAMI HERALD, Sept. 17, 2003, at 1C.

185. *Id.*

186. *See id.*

187. *Voehl v. Indem. Ins. Co. of N. Am.*, 288 U.S. 162, 169 (1933); *Longo v. Associated Limo*, 943 So. 2d 871, 944 (Fla. 1st Dist. Ct. App. 2004).

188. *See Voehl*, 288 U.S. at 169.

189. *Id.*

officers will be covered by workers' compensation and vehicle insurance "while traveling 'to and from lunch or meal breaks' or on 'personal errands' that are 'not substantial deviations from official state business.'"¹⁹⁰ Local law enforcement officers, however, are excluded from the bill.¹⁹¹

Workers' compensation benefits are sometimes reduced when the injured worker becomes eligible for social security.¹⁹² For example, Florida law requires workers who were permanently and totally disabled before age sixty-two to have their state cost-of-living supplements to their workers' compensation benefits terminated after reaching age sixty-five.¹⁹³ A challenge to this law on federal preemption grounds was unsuccessful.¹⁹⁴

H. *Unemployment Compensation*

On May 11, 2004, the United States Senate rejected by a single vote a bill that would have funded thirteen weeks of federal benefits for those unemployed who have exhausted their state aid.¹⁹⁵

I. *Occupational Health and Safety Issues*

According to the Bureau of Labor Statistics, 5524 employees died in the workplace in 2002, down from 5915 in 2001.¹⁹⁶ Workplace homicides declined to 609 in 2002.¹⁹⁷ Hispanic employees died at a higher rate than black or white workers.¹⁹⁸ According to a study conducted by the Centers for Disease Control and Prevention, driving fatalities increased with age; and time, pressure, fatigue, and unfamiliar travel enhanced the risk.¹⁹⁹ Some workplace deaths stem from employers' failure to remedy safety violations.²⁰⁰

190. Marc Caputo, *New Push to Give Cops a Break on Insurance*, MIAMI HERALD, Apr. 22, 2004, at 7B.

191. *Id.*

192. See *Harrell v. Fla. Constr. Specialists*, 834 So. 2d 352, 355–56 (Fla. 1st Dist. Ct. App. 2003).

193. *Id.* at 354 n.1.

194. *Id.* at 354.

195. Mary Dalrymple, *Jobless Benefits Won't Be Extended*, MIAMI HERALD, May 12, 2004, at 3C.

196. *Fewer Dying on the Job*, MIAMI HERALD, Sept. 18, 2003, at 1C.

197. *Id.*

198. *Id.*

199. NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH, PUB. 2003-119, WORK-RELATED ROADWAY CRASHES—CHALLENGES AND OPPORTUNITY FOR PREVENTION (Sept. 2003), available at <http://www.cdc.gov/niosh/docs/2003-119/2003-119b.html> (last visited Oct. 30, 2004).

200. *Id.*

United States Senate democrats pledged to support legislation in 2004 that would raise the maximum prison sentence for willful safety violations that cause death in the workplace.²⁰¹ Stress in the workplace leading to premature deaths in the United States is blamed in part on a volatile labor market and on strained personal finances.²⁰²

Presenteeism, according to a recent study, can cost more than absenteeism when workers go to work sick.²⁰³ Apart from getting co-workers sick, sick employees cost their employers about \$255 each per year in lost productivity.²⁰⁴

J. *Miscellaneous Workplace Issues*

1. Meal Breaks

In Florida, under Broward Sheriff's Office rules, an entire day shift of police officers cannot take a coffee break together in an adjoining city, leaving the workplace city without a patrol presence.²⁰⁵ The disclosure of such a violation gave substance to charges by critics that the merger of several cities' police departments with the Broward Sheriff's Office would mean that police protection would suffer.²⁰⁶ Among other exacting rules, deputies' meal breaks are limited to thirty minutes and they cannot be taken during the first or last hour of their shifts.²⁰⁷

2. Take-Home Cars

According to a study by the Miami Herald, over one thousand Miami employees get a free car to drive home, but only seventeen percent have homes within the city; this policy is costing taxpayers millions of dollars.²⁰⁸ Defenders of the policy argue that parked fire and police department cars

201. David Barstow, *Strong Criminal Penalties Sought for Violations That Kill Workers*, N.Y. TIMES, Apr. 28, 2004, at A15.

202. *Working Too Hard May Lead to Early Grave, Writer Says*, MIAMI HERALD, May 10, 2004, at 2GB.

203. William Kates, *Costly Sniffles; If You Go to Work Sick, You Could Hurt Your Boss—Big Time*, MIAMI HERALD, Apr. 23, 2004, at 1C.

204. *Id.*

205. Wanda J. DeMarzo, *BSO Bagel Break Broke the Rules*, MIAMI HERALD, Mar. 25, 2004, at 1A.

206. *Id.*

207. *Id.*

208. David Kidwell & Justin Willett, *Free Cars for Its Workers Cost Miami Millions*, MIAMI HERALD, Sept. 15, 2003, at 1A.

deter crime in residential neighborhoods.²⁰⁹ In response to this study, Miami has been scaling back the number of take-home vehicles which in turn has angered the city's public employee unions who allege the city has breached its labor contract by reducing the city's fleet.²¹⁰

3. Break on Traffic Tickets

For twenty-two years, Sheriff's deputies in Hillsborough County, Florida, have received a free pass on traffic tickets.²¹¹ The deputies' traffic ticket immunity was successfully challenged by a driver who was injured by a deputy who ran a red light.²¹²

IV. DISCIPLINE, DISCHARGE, DISCRIMINATION, AND REMEDIES

A. Constitutional Challenges

1. First Amendment

To establish a First Amendment retaliation claim under section 1983, a public employee must prove: 1) her speech involves a matter of public concern; 2) her speech outweighs the government-employer's legitimate interest in running an efficient workplace; 3) the speech played a key role in the contested adverse employment action; and 4) the employer would not have reached the same employment decision absent the protected speech.²¹³

In *Quinn v. Monroe County*,²¹⁴ the Monroe County Commissioners asked plaintiff as Library Director to study the feasibility of opening a library branch in Big Pine Key.²¹⁵ Plaintiff opposed the plan and told her supervisor so.²¹⁶ About a year later, plaintiff was discharged, allegedly for failure to cooperate, poor judgment, and ethical violations.²¹⁷ After an administrative hearing, plaintiff's dismissal was upheld.²¹⁸ Upon appeal, the Monroe County Circuit Court affirmed plaintiff's dismissal.²¹⁹ Next, plaintiff sued in

209. *Id.*

210. *Employees Can Keep 76 Take-Home Cars*, MIAMI HERALD, Jan. 20, 2004, at 3B.

211. *Traffic Tickets Are for Deputies Too*, MIAMI HERALD, Nov. 12, 2003, at 10B.

212. *Id.*

213. *Quinn v. Monroe County*, 330 F.3d 1320 (11th Cir. 2003).

214. *Id.* at 1329 n. 10.

215. *Id.* at 1322.

216. *Id.*

217. *Id.* at 1323.

218. *Quinn*, 330 F.3d at 1323.

219. *Id.*

federal court, contending for the first time that her dismissal was in retaliation for exercising her First Amendment right to contest the opening of the proposed library branch.²²⁰ Losing again, plaintiff appealed to the Eleventh Circuit, which ruled that the person who fired plaintiff was not the final decision maker, a prerequisite for holding the county liable.²²¹ At the same time, the person who fired the plaintiff could be held individually liable on grounds that they were the official decision maker with respect to plaintiff's discharge.²²²

In *Travers v. Jones*,²²³ a firefighter engaged in a verbal exchange with his boss while the firefighter and his co-workers were picketing outside the County's administrative office during their off-duty hours.²²⁴ The plaintiff was suspended for thirty days for insubordination and unbecoming conduct.²²⁵ The plaintiff alleged that he was disciplined in retaliation for engaging in protected union activity, a violation of his First Amendment²²⁶ rights of free speech, freedom of association, and freedom of petition.²²⁷

While the Eleventh Circuit made clear that an employer may not discipline a public employee for engaging in protected speech, an employer need not "tolerate an embarrassing, vulgar, vituperative, ad hominem attack, simply because the employee was waving the [political] sign while conducting the attack."²²⁸ Because a state administrative hearing officer resolved the disputed facts in favor of the employer, the Eleventh Circuit ruled that it must give the hearing officer's fact-finding preclusive effect.²²⁹

In *Silva v. Bieluch*,²³⁰ deputy sheriffs campaigned in favor of the incumbent sheriff who lost the election to the defendant.²³¹ The deputies "appeared in campaign advertisements, attended political rallies, and . . . in 'get out the vote'" activities.²³² Upon taking office, the new sheriff transferred the plaintiffs from their probationary lieutenantcies back to their former posts.²³³ After the federal district court dismissed plaintiff's complaint, they appealed.²³⁴

220. *Id.* at 1324.

221. *Id.* at 1326.

222. *Id.*

223. 323 F.3d 1294 (11th Cir. 2003).

224. *Id.* at 1295.

225. *Id.*

226. U.S. CONST. amend I.

227. *Travers*, 323 F.3d at 1295.

228. *Id.* at 1296 (quoting *Morris v. Crow*, 117 F.3d 449, 458 (11th Cir. 1997)).

229. *Id.* at 1297.

230. 351 F.3d 1045 (11th Cir. 2003).

231. *Id.* at 1046.

232. *Id.* at 1046-47.

233. *Id.* at 1046.

234. *Id.*

The Eleventh Circuit ruled against the plaintiffs' First Amendment claim, concluding that their political conduct did not constitute speech sufficient to trigger the traditional "Pickering" balancing test commonly enlisted to weigh public employees' free speech rights.²³⁵ In effect, plaintiffs had not spoken out on issues of public concern.²³⁶ While not addressing freedom of association, the court indirectly discussed this issue by concluding that a sheriff may promote, or demote, deputies on the basis of political patronage without offending the First Amendment.²³⁷

2. Due Process

The deputy sheriffs in *Silva v. Bieluch* also alleged violation of due process.²³⁸ Rejecting their substantive due process claim stemming from their loss of rank, the Eleventh Circuit, citing circuit precedent concluded: "[b]ecause employment rights are state-created rights and are not 'fundamental' rights created by the Constitution, they do not enjoy substantive due process protection."²³⁹ Turning to plaintiffs' procedural due process claims based on their alleged property and liberty interests, the Circuit Court rejected these claims as well.²⁴⁰ As probationary employees, the court made clear that the plaintiffs had no property interest in their rank as lieutenants.²⁴¹ As for the alleged deprivation of their liberty interest, the court applied the so-called "stigma-plus" test.²⁴² Under this test, plaintiffs must prove defamation in addition to the infringement of some more tangible interest.²⁴³ Given that plaintiffs kept their jobs, the court concluded that no liberty interest was implicated.²⁴⁴ A mere transfer back to their former rank evinced no "additional loss of a tangible interest."²⁴⁵

235. *Silva*, 351 F.3d at 1046–47.

236. *Id.* at 1047.

237. *Id.*

238. *Id.* at 1047–48.

239. *Id.* at 1047 (quoting *McKinney v. Pate*, 20 F.3d 1550, 1560 (11th Cir. 1994)).

240. *See Silva*, 351 F.3d at 1047–48.

241. *Id.* at 1048.

242. *Id.*

243. *Id.*

244. *Id.*

245. *Silva*, 351 F.3d at 1048.

B. *Employment Discrimination*

1. Generally

In general, public employees may look to the Equal Protection Clause in the Fourteenth Amendment²⁴⁶ and to Title VII of the Civil Rights Act of 1964²⁴⁷ for protection against discrimination in the workplace on grounds of race, sex, and national origin. While Title VII also protects against religious bias, under the United States Constitution such claims are nearly always assessed under the First Amendment.

During the past year the federal government has issued rules governing the collection of data useful in assessing compliance with anti-discrimination laws.²⁴⁸ On December 29, 2003, the Commerce Department's Census Bureau released data on the sex, race, and ethnicity of U.S. employees, which can be enlisted by employers in tracking progress toward a bias-free workplace.²⁴⁹

The Labor Department's Office of Federal Contract Compliance Programs (OFCCP) requires federal contractors to maintain gender, race, and ethnicity data on applicants and employees. On March 29, 2004, the OFCCP issued a proposed rule requiring contractors to collect gender, race, and ethnicity information from internet job applicants as well.²⁵⁰

On June 11, 2003, the EEOC proposed revisions to its key employer reporting form, EEO-1, to increase the number of race and ethnic categories of individuals, including the number of job categories.²⁵¹

2. Race: Section 1981

Section 1981 of the United States Code,²⁵² enacted by Congress in the wake of the Civil War to police the Thirteenth Amendment,²⁵³ supports only

246. U.S. CONST. amend. XIV, § 1.

247. 42 U.S.C. § 2000e (2003).

248. See 57 AM. JUR. 3D *Proof of Facts* § 75 (2004).

249. See U.S. CENSUS BUREAU, CENSUS 2000 SPECIAL EQUAL EMPLOYMENT OPPORTUNITY (EEO) TABULATION, available at <http://www.census.gov/hhes/www/eeoindex.html> (last revised Jul. 8, 2004).

250. Obligation to Solicit Race and Gender Data for Agency Enforcement Purposes, 69 Fed. Reg. 16,446, 16,477 (March 29, 2004) (to be codified at 41 C.F.R. pt. 60-1).

251. Agency Information Collection Activities: Revision of the Employer Information Report (EEO-1) Comment Request, 68 Fed. Reg. 34,965, 34,967 (June 11, 2003).

252. 42 U.S.C. § 1981 (2000).

253. U.S. CONST. amend. XIII.

claims alleging racial discrimination.²⁵⁴ In 1991, Congress amended section 1981 by adding 42 U.S.C. § 1981(c), which makes clear that “[t]he rights protected by this section are protected against impairment by nongovernmental discrimination.”²⁵⁵ There is a circuit court split over whether section 1981(c) opened up an implied private right of action against municipalities.²⁵⁶ Until recently, there was also a circuit court split over whether section 1981 claims are governed by different statutes of limitations depending upon whether they allege pre-formation or post-formation bias claims. But on May 3, 2004, in *Jones v. R.R. Donnelley & Sons Co.*,²⁵⁷ the Supreme Court resolved this circuit court split by ruling that federal causes of action created after 1990 are governed by a four-year statute of limitations if Congress has not spelled out a specific limitation period for them.²⁵⁸

3. Same-Sex Bias

While Title VII offers no direct protection against discrimination in the workplace on grounds of sexual orientation, gay and lesbian public employees receive some measure of protection under the Equal Protection Clause of the Fourteenth Amendment²⁵⁹ and under an array of state and local laws. In 2003, 13 states, 119 cities, and 23 counties banned sexual orientation discrimination in the workplace.²⁶⁰ On July 1, 2003, Wal-Mart Stores, Inc. became the largest private employer to ban sexual orientation discrimination in employment.²⁶¹ At the federal level, Senate Minority Leader Tom Daschle, a South Dakota Democrat, introduced a Senate bill in 2003 to ban sexual orientation bias in the workplace.²⁶² A House bill offered by Representative Edolphus Towns, a New York Democrat, would do the same.²⁶³

254. See § 1981.

255. § 1981(c).

256. See, e.g., *Watkins v. Penn. Bd. of Prob. and Parole*, No. 02-CV-2881, 2002 WL 321182088, at *4 (E.D. Penn. Nov. 25, 2002); *Fed’n of African Am. Contractors v. City of Oakland*, 96 F.3d 1204, 1210 (9th Cir. 1996).

257. 124 S. Ct. 1836 (2004).

258. *Id.* at 1845.

259. See U.S. CONST. amend. XIV, § 1.

260. *Wal-Mart Stores Expand Job Policies to Include Protection for Gay Workers*, 72 U.S.L.W. No. 2, at 2017, 2027 (2004).

261. *Id.*

262. S. 16, 108th Cong. (2003).

263. See H.R. 214, 108th Cong. (2003).

4. Gender

a. Title VII

At times, the law treats some employees who quit as though they were dismissed. This judicial doctrine is known as constructive discharge.²⁶⁴ To prevail on such a claim, the former employee must establish that a reasonable person, faced with similar unfair employment conditions, would leave rather than continue to suffer such conditions.²⁶⁵ While the United States Supreme Court has acknowledged the doctrine in other labor contexts,²⁶⁶ until 2004, it had not explicitly recognized it under Title VII.²⁶⁷

But on June 14, 2004, the United States Supreme Court ruled that employees who quit over “intolerable” sexual harassment may sue their employers as though they had been fired, even if they did not actually lodge a complaint.²⁶⁸ Employers however, may avoid liability for damages if they can persuade a jury that the employee unreasonably ignored the complaint procedure.²⁶⁹ This ruling can fairly be read as applying not only to sexual harassment, but also to race, national origin, religion, age, and disability discrimination.

In 1998, to further strengthen the law governing sexual harassment in the workplace, the United States Supreme Court decided two cases dealing with employer liability for sexual harassment by supervisors under Title VII: *Faragher v. City of Boca Raton*²⁷⁰ and *Burlington Industries Inc. v. Ellerth*.²⁷¹ These two rulings left room for employers to raise a successful defense by, for example, establishing that victims of sexual harassment had unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer. In *Walton v. Johnson & Johnson Services Inc.*,²⁷² the Eleventh Circuit Court ruled that the employer was entitled to avail itself of this affirmative defense outlined in *Farragher* and *Ellerth*, given that the employer quickly removed the harassing supervisor.²⁷³

264. See *Penn. State Police v. Suders*, 124 S. Ct. 2342, 2351 (2004) [hereinafter *Suders I*].

265. *Suders v. Easton*, 325 F.3d 432, 445 (3d. Cir. 2003).

266. See, e.g., *Speth v. Capitol Indem. Corp.*, 139 F.3d 902 (7th Cir. 1998) (holding that an employee was unable to establish prima facie case for constructive discharge).

267. *Suders I*, 124 S. Ct. at 2352.

268. See *id.* at 2357.

269. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

270. 524 U.S. 775 (1998).

271. 524 U.S. 742 (1998).

272. 347 F.3d 1272 (11th Cir. 2003).

273. *Id.* at 1293.

b. *Title IX*

Title IX of the Education Amendments of 1972,²⁷⁴ provides that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”²⁷⁵ Title IX governs public employees to a limited extent.²⁷⁶ Public school teachers, for example, may sue for sex discrimination under the Act.²⁷⁷ The Supreme Court has made clear that damages are recoverable under Title IX only for intentional sex discrimination.²⁷⁸ But under proposed federal legislation, namely the Civil Rights Act of 2004, disparate impact claims would also be cognizable under the Act.²⁷⁹

5. Age

The 1967 Age Discrimination in Employment Act (ADEA) prohibits age discrimination of any worker age forty or older.²⁸⁰ In *General Dynamics Land Systems, Inc. v. Cline*,²⁸¹ two hundred employees alleged they suffered reverse age discrimination because they were too young to qualify for benefits offered to co-workers age fifty and over.²⁸² On February 24, 2004, the United States Supreme Court ruled, six to three, that an employer does not violate the ADEA rights of employees in their forties by favoring an older employee over a younger one.²⁸³ In rejecting the plaintiffs’ reverse discrimination claim, Justice Souter, who wrote for the majority, pointed out that “[t]he enemy of 40 is 30, not 50.”²⁸⁴ Advocacy groups for people over fifty nailed the decision, giving older workers preferential treatment.²⁸⁵

The circuit courts of appeal are split five-to-three over whether disparate impact claims may lie under the ADEA.²⁸⁶ Unlike disparate treatment, disparate impact does not include the intent to discriminate, and the em-

274. 20 U.S.C. § 1681 (2000).

275. § 1681(a).

276. *See id.*

277. *See, e.g.,* Chance v. Rice Univ., 984 F.2d 151, 152 (5th Cir. 1993).

278. Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 75 (1992).

279. *See* H.R. 3809, 108th Cong. § 603 (2004); S. 2088, 108th Cong. § 603 (2004).

280. 29 U.S.C. § 631(a) (2000).

281. 124 S. Ct. 1236 (2004).

282. *Id.* at 1239.

283. *Id.* at 1248–49.

284. *Id.* at 1243.

285. Gina Holland, *Younger Workers Lose Age-Discrimination Case*, MIAMI HERALD, Feb. 25, 2004, at 3C.

286. *See, e.g.,* Smith v. City of Jackson, Miss., 351 F.3d 183, 187 (5th Cir. 2003).

employer's burden is heavier.²⁸⁷ For these reasons, this framework has influenced various appeals for many aggrieved employees. Proposed legislation, namely the Civil Rights Act of 2004, would make clear that disparate impact claims are cognizable under the ADEA.²⁸⁸ Moreover, on March 29, 2004, the Supreme Court agreed to hear a case involving older police officers in Jackson, Mississippi that will decide the issue under the ADEA as it is currently written.²⁸⁹ In *Smith v. City of Jackson, Mississippi*,²⁹⁰ older officers claimed that new wage rates had the effect of giving proportionately smaller increases to the older officers.²⁹¹ Both lower federal courts in the case ruled that only disparate treatment cases may be brought under the ADEA.²⁹² In 2002, the United States Supreme Court sidestepped the issue in a case brought by older workers against the Florida Power Corporation.²⁹³ EEOC regulations recognize the disparate impact framework under the ADEA.²⁹⁴

Currently, ADEA suits must be filed within ninety days of receipt of a right to sue notice from the EEOC.²⁹⁵ However, on December 17, 2003, the EEOC published a final rule clarifying that charging parties under the ADEA need not wait for the EEOC's notice of dismissal of the charge before pursuing a private civil suit.²⁹⁶

6. Disability

The Americans With Disabilities Act (ADA) prohibits discrimination against applicants and employees who suffer either from mental or physical impairment, not only at the hiring and dismissal stages, but also regarding virtually every other term and condition of employment.²⁹⁷ Despite the scope of this protection, according to a survey by the American Bar Association in

287. *Ass'n for Disabled Americans v. Concorde Gaming Corp.*, 158 F. Supp. 2d 1353, 1361 (S.D. Fla. 2001).

288. *See* H.R. 3809, 108th Cong. § 603 (2004); S. 2088, 108th Cong. § 603 (2004).

289. Linda Greenhouse, *Supreme Court to Consider Role of Intent in Age Bias*, N.Y. TIMES, Mar. 30, 2004, at A16.

290. 351 F.3d 183 (5th Cir. 2003).

291. *Id.* at 185.

292. *Id.*

293. *Id.* at 187.

294. *Id.* at 200.

295. 29 U.S.C. § 626(e) (2000).

296. Procedures—Age Discrimination in Employment Act, 68 Fed. Reg. 70,150 (Dec. 17, 2003) (to be codified at 29 C.F.R. pt. 1626).

297. *Den Hartog v. Wasatch Acad.*, 129 F.3d 1076, 1084 (10th Cir. 1997).

2002, employers won 94.5 percent of federal court decisions rendered under Title I of the ADA, which pertains to employment.²⁹⁸

In 2001, the United States Supreme Court ruled, in *Board of Trustees of the University of Alabama v. Garrett*,²⁹⁹ that state employees may not sue their employers for damages in federal court for violations of Title I of the ADA.³⁰⁰ Another source of state and local government liability for public employee claims of disability discrimination is found in section 503 of the Rehabilitation Act,³⁰¹ which covers contracts between the federal government, and state and local governments.³⁰² The Eleventh Circuit Court of Appeals has ruled that the receipt of federal funds by a state agency is a waiver of that agency's Eleventh Amendment immunity from suit under the Rehabilitation Act.³⁰³

Under the ADA, "the term 'individual with a disability' does not include an individual who is currently engaging in the illegal use of drugs."³⁰⁴ On December 2, 2003, in *Raytheon Co. v. Hernandez*,³⁰⁵ the United States Supreme Court addressed a disparate treatment claim by a former employee who was terminated after testing positive for drugs.³⁰⁶ The Court ruled that it was improper to apply disparate impact analysis to conclude that the employer's neutral no-hire policy had a discriminatory impact on rehiring rehabilitated drug addicts.³⁰⁷ Instead, the Court made clear the proper framework for judging whether the employer's policy violated the ADA, which was whether it amounted to a legitimate, nondiscriminatory reason sufficient to defeat the employee's prima facie case of discrimination.³⁰⁸ This narrow ruling does not decide the larger issue of whether former drug addicts and alcoholics are entitled to equal treatment when they seek employment elsewhere.³⁰⁹

The ADA outlaws retaliation against employees who file a charge, testify, assist, or play any role in investigations, proceedings, or hearings under

298. Amy L. Allbright, 2003 *Employment Decisions Under the ADA Title I—Survey Update*, 28 MENTAL & PHYSICAL DISABILITY L. REP. 319, 320 (2004).

299. 531 U.S. 356 (2001).

300. *Id.* at 374.

301. 29 U.S.C. § 793 (2000).

302. *Id.*

303. *Garrett v. Univ. of Ala. at Birmingham Bd. of Trs.*, 193 F.3d 1214, 1218 (11th Cir. 1999).

304. 42 U.S.C. § 12210(a) (2004).

305. 540 U.S. 44 (2003).

306. *Id.* at 516.

307. *Id.* at 520.

308. *Id.* at 521.

309. David G. Savage, *High Court Upholds Firm's Rehiring Ban*, L.A. TIMES, Dec. 3, 2003, at A22.

the ADA.³¹⁰ The term “retaliation” includes any interference, coercion, or intimidation of employees exercising their ADA rights.³¹¹ But the plaintiff must prove that she sustained an adverse employment action in order to prevail on her retaliation claim. In *Mays v. City of Tampa*,³¹² the Eleventh Circuit ruled that neither critical performance reviews by a supervisor, nor added work load to compensate for an employee’s pregnancy and hearing loss, amounted to an adverse employment action required to make out a prima facie case of retaliation under the ADA.³¹³

Under the ADA, the employer owes the duty of reasonable accommodation to the physical or mental impairments of an otherwise qualified individual.³¹⁴ In an informal guidance letter, the EEOC has clarified that employers are not required “to collect and safely dispose of used needles and syringes as a reasonable accommodation for employees who must use them to treat medical conditions, such as diabetes.”³¹⁵ In *Wood v. Green*,³¹⁶ the Eleventh Circuit ruled that an employer need not reasonably accommodate an employee’s request for indefinite leave to treat his headaches so that he could work at some uncertain point in the future.³¹⁷ And at Miami International Airport, a security screener alleged that his employer wrongfully refused to reasonably accommodate his disability, poor night vision, by forcing him to ride his bicycle to work at three o’clock in the morning.³¹⁸

7. Religion

Under Title VII, it is unlawful for an employer to refuse to hire, dismiss, or otherwise discriminate against anyone with respect to her wages, terms, or conditions of employment owing to such person’s religion.³¹⁹ In 2003, nearly six hundred Muslims filed employment discrimination claims involving their faith, about double the number of cases arising in 2000.³²⁰ Most

310. 42 U.S.C. § 12203(a) (2000).

311. § 12203(b).

312. No. 02-16556, 2003 WL 21283511, at *1 (11th Cir. May 23, 2003).

313. *Id.*

314. 42 U.S.C. § 12111(8) (2000).

315. *Employer Not Required to Dispose of Syringes for Employees Treating Medical Conditions*, 72 U.S.L.W. 2665, 2674 (2004).

316. 323 F.3d 1309 (11th Cir. 2003).

317. *Id.* at 1314.

318. Joan Fleischman, *Airport Screener is Suing Over Bike Rides*, MIAMI HERALD, May 12, 2004, at 1B.

319. 42 U.S.C. § 2000e-2(a)(1).

320. Mary Beth Sheridan, *Bias Against Muslims Surges, Group Reports*, MIAMI HERALD, May 4, 2004, at 9A.

cases involved an employer's refusal to accommodate Muslims' religious practices.³²¹

Two Eleventh Circuit Court of Appeals cases involving religion in the workplace were decided in 2003.³²² In *Rossi v. Troy State University*,³²³ a public university professor's hostile work environment claim failed because the plaintiff was unable to prove that repeated religion based harassment was sufficiently hostile to alter the terms and conditions of his employment.³²⁴ In *Eljack v. Security Engineers Inc.*,³²⁵ the Court addressed a perennial question raised by some employees sporting facial hair out of religious conviction: whether an employer violates a worker's religious rights by forcing him to shave his beard?³²⁶ The answer often turns on the business justification for such a policy.

C. Remedies

There is a growing form of mandatory arbitration negotiated between individual employees and their employers governed by the Federal Arbitration Act.³²⁷ This type of arbitration may be binding on the parties, foreclosing any recourse to courts other than to appeal the decision of an arbitrator, which is rarely overturned.³²⁸ However, under proposed legislation, the Civil Rights Act of 2004,³²⁹ the Federal Arbitration Act would be amended to exclude employment contracts and would bar employers from forcing employees to sign mandatory arbitration agreements waiving their right to sue in court.³³⁰ If enacted, the measure would overturn a United States Supreme Court decision, *Circuit City Stores Inc. v. Adams*,³³¹ interpreting the Federal Arbitration Act as encompassing most employment contracts, except for those involving transportation employees.³³²

321. *Id.*

322. See *Rossi v. Troy State Univ.*, No. 02-15455, 2003 WL 21283627, at *1 (11th Cir. May 30, 2003); *Eljack v. Sec. Eng'rs, Inc.*, 2003 U.S. App. LEXIS 22183, at *1 (11th Cir. May 30, 2003), *reh'g denied*, 124 S. Ct. 2091 (2004).

323. No. CIV.A.01-A-1319-N, 2002 WL 32627779, at *1 (M.D. Ala. July 22, 2002), *rev'd en banc*, No. 02-15455, 2003 WL 21283627, at *1 (11th Cir. May 30, 2003).

324. *Id.* at *3-4.

325. Appellees' Brief at *3, *Eljack v. Sec. Eng'rs, Inc.*, No. 02-15852-AA, 2002 WL 32182374 (11th Cir. Dec. 23, 2002).

326. *Id.*

327. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

328. *Id.*

329. H.R. 3809, 108th Cong. § 603 (2004); S. 2088, 108th Cong. § 603 (2004).

330. *Id.*

331. 532 U.S. 105 (2001).

332. H.R. 3809 § 603; S. 2088 § 603.

The proposed Civil Rights Act of 2004 would substantially alter current labor and employment law in other ways as well.³³³ For example, under the bill, undocumented workers would be entitled to recover back pay if they are victims of employment discrimination.³³⁴ Moreover, the Act would also lift the cap on Title VII damage awards.³³⁵

Finally, many courts have attempted to constrain efforts by employers to tip the scales in their favor by slipping in one-sided provisions in arbitration agreements. The Eleventh Circuit faced such an issue in *Summers v. Dillard's, Inc.*,³³⁶ where language in an arbitration agreement, drafted by the employer, afforded relief for attorneys' fees only.³³⁷ Thus, the employee initially prevailed at arbitration.³³⁸ Despite this exacting standard, the Court refused to deem the provision unconscionable, thus leaving the employee bound by his promise to arbitrate all sex and age discrimination claims.³³⁹

333. *Id.*

334. H.R. 3809 § 702.

335. H.R. 3809 § 112.

336. 351 F.3d 1100 (11th Cir. 2003).

337. *Id.* at 1101.

338. *Id.*

339. *Id.*

ETHICAL OBLIGATIONS: PERFORMING ADEQUATE LEGAL RESEARCH AND LEGAL WRITING

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I. INTRODUCTION

Legal research and legal writing are fundamental skills necessary to the practice of law. Thus, it should come as no surprise that an attorney's failure to perform adequate legal research and write well can violate the attorney's professional responsibility. A demonstrated lack of competent legal research and legal writing performance is injurious to an attorney's reputation. Failure to adequately research or write well, or both, is a violation of ethics rules and can result in a reprimand, suspension, or disbarment from the practice of law; a client may decide that it is the basis of a legal malpractice lawsuit.

Many states have adopted the *American Bar Association (ABA) Model Rules of Professional Conduct* and the ethics rules of other states may have provisions similar to those of the Model Rules. A number of the Model

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Rules are related to the duty of the attorney to perform adequate legal research and write well. Far from being a technicality, problems with the attorney's legal research and legal writing can violate the Model Rules.

Those professors who teach legal research and legal writing bemoan the students who do not apply themselves in class, perhaps believing that class material will not be relevant to them in the future. Exposing students to cases in which sloppy legal research or inattention to grammar or court rules resulted in severe sanctions can serve as a cautionary tale, impressing upon them the importance of developing sound legal research and legal writing skills.

This article will provide a discussion of specific parts of the *ABA Model Rules of Professional Conduct* that relate to the attorney's legal research and writing obligations. Each section will introduce the reader to a Model Rule, or a portion of a Model Rule, and supply case law examples of the sanctions meted out to attorneys found to be in violation of the rules. The importance of the attorney's duty to perform adequate legal research may possibly be reflected in the fact that it is the first rule in the Model Rules.

II. ADEQUATE LEGAL RESEARCH

Rule 1.1 of the *Model Rules of Professional Conduct* requires the attorney to provide the client with competent representation.¹ The rule provides: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."²

Performing any needed legal research is one of the elements to providing competent representation for the client. An attorney must perform legal research to have the legal knowledge necessary to competently represent a client.³ However, many attorneys apparently fail to perform even basic legal

1. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2004).

2. *Id.* In *Howard v. Oakland Tribune*, 245 Cal. Rptr. 449, 451 n.6 (Cal. Ct. App. 1988), the annoyance of the court was palpable when it chastised the attorney for sloppy citations. "We were not aided in our resolution of this appeal by the appellants' opening brief, which was riddled with inaccurate and incomplete citations and which frequently referred to cases without reference to the pages on which the cited holdings appear." *Id.*

3. One of the fundamental tasks in legal research is to ascertain that authority found is still good law by using a citator. Omitting this step can cause grave problems. In *Fletcher v. State*, 858 F. Supp. 169, 172 (M.D. Fla. 1994), the court noted that the plaintiffs cited one case that had been overruled and another that was reversed.

research. Weinstein, the attorney in the following case, provided legal advice without performing any legal research.⁴

In *Baldayaque v. United States*,⁵ Baldayaque, an illegal immigrant from the Dominican Republic, pled guilty to a heroin charge and was sentenced to 168 months in prison.⁶ At sentencing, the court admitted that the sentence was harsh but required by the sentencing guidelines, and the court would not object if the government chose to deport Baldayaque rather than have him remain in prison.⁷ At Baldayaque's request, his wife, Christina Rivera, hired Weinstein to file a petition for writ of habeas corpus.⁸ Without completing any legal research, Weinstein informed Rivera that the time had passed for filing a petition for writ of habeas corpus; however, Baldayaque had nearly fourteen months within which to do so.⁹ Weinstein did file a motion requesting that Baldayaque's sentence be modified to permit the government to deport him; however, that motion failed to cite any legal authority supporting it.¹⁰ The district court denied the motion stating that the court did not have jurisdiction and the motion was untimely.¹¹ Weinstein informed Baldayaque in writing of the court decision, but the letter was returned to Weinstein.¹²

Eighteen months later, Baldayaque filed a motion on a pro se basis to have his sentence modified.¹³ The court denied the motion but gave Baldayaque information regarding the filing of a habeas petition.¹⁴ With that information, Baldayaque, again on a pro se basis, filed a petition for writ of habeas corpus.¹⁵

4. *Baldayaque v. United States*, 338 F.3d 145 (2d Cir. 2003). In *Smith v. Lewis*, 530 P.2d 589 (Cal. 1975), the court explained that an attorney is expected "to possess knowledge of those plain and elementary principles of law which are commonly known by well informed attorneys, and to discover those additional rules of law which, although not commonly known, may readily be found by standard research techniques." *Id.* at 595. The court gave an example of a minimum standard: "In evaluating the competence of an attorney's services, we may justifiably consider his failure to consult familiar encyclopedias of the law." *Id.* at 593 n.5 (citing *People v. Ibarra*, 386 P.2d 487, 491 (Cal. 1963)). In *Pineda v. Craven*, 424 F.2d 369, 372 (9th Cir. 1970), the Ninth Circuit brutally clarified that although an attorney may make a strategic or tactical decision on behalf of a client, "[t]here is nothing strategic or tactical about ignorance."

5. 338 F.3d 145 (2d Cir. 2003).

6. *Id.* at 147.

7. *Id.* at 148.

8. *Id.*

9. *Id.* at 148-49.

10. *Baldayaque*, 338 F.3d at 149.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Baldayaque*, 338 F.3d at 149.

The court found that Weinstein had violated the state ethics rule, which is identical in wording to rule 1.1 of the *Model Rules of Professional Conduct*.¹⁶ The court held that “an attorney’s conduct, if it is sufficiently egregious, may constitute . . . ‘extraordinary circumstances.’”¹⁷ Extraordinary circumstances combined with reasonable diligence on Baldayaque’s part could allow tolling of the one year period.¹⁸ The Court of Appeals for the Second Circuit remanded the case to the district court to determine whether Baldayaque had been reasonably diligent.¹⁹

The failure to perform adequate research is clearly unprofessional and unacceptable. However, the failure to comply with a court rule that specifies a format becomes unbelievable. Courts burdened under an overwhelming number of cases do not take kindly to attorneys who fail to comply with the format required by court rules.

III. COMPLIANCE WITH COURT RULES

If an attorney fulfills the obligation to perform adequate research and in doing so locates specific formats that the court rules require, logic would suggest that the format should be followed. Incompetence may be demonstrated by the attorney’s noncompliance with court rules.²⁰ In the following three cases, failure to comply with court rules resulted in severe sanctions.

16. *Id.* at 152.

17. *Id.* at 152.

18. *Id.* at 153.

19. *Id.*

20. In *Henning v. Kaye*, 415 S.E.2d 794, 794 (S.C. 1992), the Supreme Court of South Carolina barely refrained from dismissing an appeal because the appellant’s brief failed to conform to the court rule regulating brief format.

[T]he components of the brief are incorrectly organized and labeled, the issues are not distinctively headed, the table of authorities is not alphabetized or referenced to the body of the brief, the statement of the case contains contested matter and omits required information, and the arguments contain no citations to the record or to the cases listed in the table of authorities.

Id. The court reminded the attorney of the importance of court rules: “[T]he South Carolina Appellate Court Rules are not mere technicalities but provide the parties and this Court with an orderly mechanism through which to guide appeals” *Id.* In *TSC Express Co. v. G.H. Bass & Co. (In re Allen)*, 176 B.R. 91, 95 n.2 (D. Me. 1994), the court denied both parties’ motions for summary judgment because they failed to comply with the local rule requiring a motion for summary judgment to be supported with a memorandum containing a factual statement with references to the record. One of the parties failed to make references to the record and the other failed to provide a factual statement. *Id.* In addition, both parties’ memoranda were too long. *Id.* “The briefs of both sides are prolix, verbose, and full of inaccuracies, misstatements and contradictions. The lawyering on behalf of both parties falls woefully short of the standards to which attorneys practicing before this court have been traditionally held” *Id.* Many courts take page limit restrictions seriously. In the following

In *In re O'Brien*,²¹ the court dismissed the appeal because the appellant “has seen fit to ignore the *Federal Rules of Appellate Procedure* and Ninth Circuit rules, and essentially tossed this bankruptcy case in our laps, leaving it to us to figure out the relevant facts and law. We decline to do so.”²² The court commented that “[a]n enormous amount of time is wasted when attorneys fail to provide proper briefs and excerpts of record that should have supplied the court with the materials relevant to the appeal.”²³

cases, the courts sanctioned attorneys for failure to comply with page limit restrictions. In *Insulated Panel Co. v. Industrial Commission*, 743 N.E.2d 1038, 1040 (Ill. App. Ct. 2001), the appellate court approved the trial court’s decision of considering only the first ten pages of a fifty-page brief after the court had announced that it was limiting briefs to ten pages. Similarly, in *Van Winkle v. Owens-Corning Fiberglas Corp.*, 683 N.E.2d 985, 989 (Ill. App. Ct. 1997), Owens-Corning placed some of its argument in single-spaced footnotes to comply with the page limit on briefs. The court announced that in the future it would ignore material in footnotes when the footnotes are used to avoid the page limit rule. *Id.* at 990. In *State v. Hudson*, 473 S.E.2d 415, 417 (N.C. App. 1996), *rev’d on other ground*, 483 S.E.2d 436 (N.C. 1997), the court ordered Hudson’s attorney to pay \$500 because the brief was forty-two pages, thus above the thirty-five page limit under the appellate rules. In *Varda, Inc. v. Insurance Co. of North America*, 45 F.3d 634, 640 (2d Cir. 1995), the successful party was not awarded costs because of its violation of the court rule limiting briefs to fifty pages. “[A]pproximately 75% of Varda’s statement of facts and argument appear in footnotes. If Varda had presented its facts and argument in . . . the text, its briefs would have been roughly seventy pages.” *Id.* In *TK-7 Corp. v. Estate of Barbouti*, 966 F.2d 578, 579 (10th Cir. 1992), the court struck the defendants’ brief because it failed to conform to the fifty-page limit. The writer had moved text into footnotes and reduced the footnote font below the pica ten pitch spacing minimum. Otherwise the brief would have been almost twice the fifty-page limit. *Id.* In *White Budd Van Ness Partnership v. Major-Gladys Drive Joint Venture*, 811 S.W.2d 541, 541 (Tex. 1991), the Supreme Court of Texas dismissed an Application for Writ of Error because, although the Application complied with the fifty-page limit, the writer had reduced the type size and narrowed the margins to achieve the limit. In *Buffalo v. Robbins*, 811 S.W.2d 541, 541–52 (Tex. 1991), the Supreme Court of Texas struck the Application for Writ of Error because it failed to comply with the court rule governing format of the Application. Some page limit restrictions apply even in a death penalty case. In *Pratt v. Armenakis*, 56 P.3d 920, 921 (Or. 2002), the attorney seeking post-conviction relief for the client asked to file a 260-page brief. The judge permitted a brief of one hundred pages instead of the usual fifty. *Id.* The attorney repeated the request to file a 260-page brief. *Id.* The judge permitted a brief of 150 pages. *Id.* The Supreme Court of Oregon affirmed the judge’s decision to allow a brief with a maximum of 150 pages. *Id.* at 923. One Illinois court takes pinpoint references seriously. In *Ikari v. Mason Properties*, 731 N.E.2d 975, 978 (Ill. App. Ct. 2000), the court admonished the parties for failing to include pinpoint references. “All of the cases cited by defendant, and most of the cases cited by plaintiffs, lack reference to the official reports’ page numbers upon which the pertinent matters appear.” *Id.*

21. 312 F.3d 1135 (9th Cir. 2002).

22. *Id.* at 1137.

23. *Id.* In *Morters v. Barr*, No. 01-2011, 2003 WL 115359, at *4 (Wis. App. Jan. 14, 2003), the court ordered the appellants to pay the respondents’ costs and attorney fees because the appellants’ brief failed to comply with the applicable court rule. The court stated: “We

In *Catellier v. Depco, Inc.*,²⁴ Ziobron, Catellier's attorney, was ordered to pay Depco's attorney fees for the appeal because of Ziobron's failure to comply with the appellate rules governing appellate briefs.²⁵ Ziobron's brief exceeded the maximum number of pages allowable and used smaller font than required in the text and the footnotes.²⁶ The statement of the case and the statement of the facts incorrectly included an argument.²⁷ Pinpoint citations were omitted.²⁸ The argument section was so poorly written that it was difficult to understand and contained accusations against the trial court.²⁹

recognize that it is unreasonable to expect every attorney in Wisconsin to construct arguments as if they were authored by Learned Hand, but a line must be drawn separating adequate from inadequate briefs in order to give some life to the requirements of Wis. Stat. Rule 809.19." *Id.* at *3-4. In evaluating the appellants' brief the court found that "[t]he appellants' brief falls short of the mark—the brief was apparently thrown together by making a number of general claims of error and then quoting two pages of law that may or may not be relevant to the case at hand." *Id.*

24. 696 N.E.2d 75 (Ind. Ct. App. 1998).

25. *Id.* at 80.

26. *Id.* at 79.

27. *Id.*

28. *Id.*

29. *Catellier*, 696 N.E.2d at 79. The statements about the judge could have violated another ethics rule prohibiting an attorney from impugning the reputation of the judge. Another ploy attempted by some attorneys to avoid the maximum page limit is to incorporate another document by reference. In *Guerrero v. Tarrant County Mortician Services Co.*, 977 S.W.2d 829, 832-33 (Tex. Ct. App. 1998), the court refused to consider the appellants' arguments regarding official immunity contained in their responses to the defendants' motion for summary judgment. In *Glover v. Columbia Fort Bend Hospital*, No. 06-01-00101-CV, 2002 WL 1430783, at *5 (Tex. Ct. App. July 3, 2002), Glover's pro se brief was ninety pages long, exceeding the maximum length by more than forty pages. When the court struck the brief and ordered him to submit a brief in compliance with the court rule, Glover requested leave to exceed the page limit, which the court denied. *Id.* Glover's new brief complied with the page limit but incorporated a number of arguments by reference from his original brief. *Id.* The court refused to consider argument contained in the original brief. *Id.* at *5-6. In *Westinghouse Electric Corp. v. N.L.R.B.*, 809 F.2d 419, 424-25 (7th Cir. 1987), the court sanctioned an attorney \$1000, to be paid by the attorney, for failing to conform the brief format to rule 28(g), which limits the opening brief to fifty pages. The court noted that:

Fed. R. App. P. 32(a) requires typed briefs to be double-spaced and to observe specified margins. Briefs also must have type 11 points or larger, ruling out elite type. Westinghouse disregarded all of these rules. It filed a brief with approximately 1 1/2 spacing, with type smaller than 11 points, and with margins smaller than those allowed. The effect was to stuff a 70-page brief into 50 pages. One has the sense that the lawyers wrote what they wanted and told the word processing department to jiggle the formatting controls until the brief had been reduced to 50 pages. Our clerk's office did not catch the maneuver. The judges did, and when we required Westinghouse to file a brief complying with the rules counsel responded by moving gobs of text into single-spaced footnotes, thereby leaving essentially the same number of words in the brief.

Id. at 425 n.1. In *Laitram Corp. v. Cambridge Wire Cloth Co.*, 919 F.2d 1579, 1584 (Fed. Cir. 1990), the attorneys were each ordered to pay \$1000 in sanctions due to their failure to conform the briefs to applicable court rules.

In *Ernst Haas Studio, Inc. v. Palm Press, Inc.*,³⁰ the court affirmed the dismissal of the appellant's complaint and sanctioned the attorney, ordering the attorney personally liable for the appellee's reasonable attorney's fees where the attorney failed to conform the appellate brief to the court rule governing briefs.³¹ "Appellant's Brief is at best an invitation to the court to scour the record, research any legal theory that comes to mind, and serve generally as an advocate for appellant. We decline the invitation."³²

Although most attorneys do not have difficulty following formats required by court rules, some attorneys graduate from law school and pass the bar, yet their writing skills fall below what courts tolerate. The following section discusses two cases in which attorneys were sanctioned because of their poor writing.

IV. ADEQUATE WRITING

The competence required under rule 1.1 includes adequate writing skills.³³ In *Kentucky Bar Ass'n v. Brown*,³⁴ attorney Brown filed an appellate

Counsel for neither side appears willing, even when cautioned, to understand and follow the rules governing the appellate process. Showing no mercy on this busy court, they first filed briefs so replete with cross-charges of misstatements and so lacking in record references as to frustrate the desire of this court to trust its officers in this case. The court was thus compelled to decline the burden of checking each statement and to reject those briefs . . . Continuing a kind of "Alice in Patentland" approach to the judicial process, the parties' conduct then grew "curiouser and curi-ouser," for their new briefs include: statements of fact with no record reference; statements of fact for which there is no record; reliance on attorney argument and counsel's unsworn fact statements as 'evidence'; citation of materials and raising of questions as though they were before the district court when the present record indicates they were not; assertions of and reliance on facts that occurred after entry of the judgment appealed from; irreconcilably conflicting positions of the same party; citation of inapplicable authorities; page upon page of argument about a product that was admittedly not before the district court and is not before this court; arguments directed to products never charged as infringements; disregard of the concerns expressed by this court at oral argument; and a refusal to come to grips with the questions propounded by this court. Far from aiding this court to decide, by presenting legal arguments on concrete fact patterns, counsel have in this case wasted this court's resources by playing in the rarified atmosphere of a debating society. In sum, the parties' briefs and arguments on this appeal serve not to seek but to obfuscate the truth.

Id. at 1583–84 (citations omitted).

30. 164 F.3d 110 (2d Cir. 1999).

31. *Id.* at 113.

32. *Id.* at 112. In similar fashion, the Court of Appeals for the Second Circuit dismissed the appeal in *Sioson v. Knights of Columbus*, 303 F.3d 458, 459 (2d Cir. 2002) for the appellant's attorney to submit "an adequate brief."

33. MODEL R. PROF'L CONDUCT R. 1.1. In *State v. Bridget*, No. 70053, 1997 WL 25518, at *3 n.3 (Ohio App. Dist. 1997), the court stated:

[W]e note that appellant counsel's brief is replete with over fifty examples of mistakes in punctuation, citation and spelling. We note that appellant's counsel is a former judicial clerk with service to this court and is urged to do credit to his former position by applying greater attention to detail in his brief writing and proofreading efforts before the Bench.

brief that was “a little more than fifteen unclear and ungrammatical sentences, slapped together as two pages of unedited text with an unintelligible message.”³⁵ The Supreme Court of Kentucky noted that Brown’s brief “would compare unfavorably with the majority of the handwritten pro se pleadings prepared by laypersons which this Court reviews on a daily basis.”³⁶ The Supreme Court of Kentucky suspended Brown from the practice of law for sixty days for violating the state ethics rule that was identical in wording to Model Rule 1.1.³⁷

In *In re Hogan*,³⁸ attorney Hogan “lack[ed] the fundamental skill of drafting pleadings and briefs,” with some of the passages understandable and other passages “incomprehensible.”³⁹ The Supreme Court of Illinois placed Hogan on inactive status while undergoing rehabilitation.⁴⁰ In 1998, Hogan filed a Petition for Restoration to Active Status with the Hearing Board of the Illinois Attorney Registration and Disciplinary Commission.⁴¹ The Hearing Board recommended that Hogan’s petition be denied because Hogan had not undergone any treatment since 1987 and the petition Hogan submitted showed that his writing was “incomprehensible.”⁴²

In *In re Hawkins*,⁴³ Hawkins filed documents in bankruptcy court that were “rendered unintelligible by numerous spelling, grammatical, and typographical errors . . . sufficiently serious that they amounted to incompetent representation.”⁴⁴ The Supreme Court of Minnesota found that Hawkins had violated the state ethics rule version of rule 1.1 and publicly reprimanded

Id. In *Arena Land & Investment Co. v. Petty*, No. 94-4196, 1995 WL 645678, at *1 (10th Cir. Nov. 3, 1995), Arena’s third amended complaint was dismissed because it failed to give defendants notice of the claims against them. The complaint contained “confusing grammatical and structural problems that contained legal conclusions unsupported by relevant facts.” *Id.* at *2. Arena also failed to delete “scandalous, impertinent and redundant matter” as requested by the trial court. *Id.* The court added that “[v]ague and conclusory assertions, regardless of how long or how short, are inadequate to state such causes of action.” *Id.*

34. 14 S.W.3d 916 (Ky. 2000).

35. *Id.* at 918–19.

36. *Id.* at 919.

37. *Id.* at 918–919.

38. No. 98-RS-2552, 1999 WL 802922, at *1 (Ill. Att’y Registration & Disciplinary Comm’n Feb. 15, 1998).

39. *Id.* at *1.

40. *Id.* at *3.

41. *Id.* at *4.

42. *Id.* at *4–6.

43. 502 N.W.2d 770 (Minn. 1993).

44. *Id.* at 770–71.

him.⁴⁵ The court ordered Hawkins to attend ten hours of legal writing and other continuing legal education programs.⁴⁶

In *Henderson v. State*,⁴⁷ Henderson challenged the adequacy of his indictment because of its poor grammar.⁴⁸ The court stated: "Though grammatically unintelligible, we find that the indictment is legally sufficient and affirm, knowing full well that our decision will receive of literate persons everywhere opprobrium as intense and widespread as it will be deserved."⁴⁹

The substantive and procedural content of legal writing must be communicated clearly, but it must also meet the requirement of timeliness. The attorney must perform legal research and legal writing tasks with reasonable promptness.

V. DILIGENCE

An attorney must comply with deadlines or be subject to sanctions.⁵⁰ Rule 1.3 of the *Model Rules of Professional Conduct* requires the attorney to act in a timely fashion: "A lawyer shall act with reasonable diligence and promptness in representing a client."⁵¹ In the following case, the attorney failed to perform adequate legal research, which resulted in the attorney filing the lawsuit after the two-year statute of limitations had passed.

In *Idaho State Bar v. Tway*,⁵² a client hired Tway in August of 1989 to pursue a police brutality claim against the Boise Police Department.⁵³ Tway consulted the annotations to the Idaho Code, finding a 1981 case stating that a civil rights action under 42 U.S.C. § 1983 is subject to a three-year statute of limitations.⁵⁴ Tway failed to Shepardize the case to find that in a 1986 case the Supreme Court of Idaho held that a civil rights action was subject to a two-year statute of limitations.⁵⁵ The two-year statute of limitations had

45. *Id.* at 771.

46. *Id.* at 772.

47. 445 So. 2d 1364 (Miss. 1984).

48. *Id.* at 1366.

49. *Id.* at 1365.

50. In *Julien v. Zeringue*, 864 F.2d 1572 (Fed. Cir. 1989), the appeal was dismissed for failure to prosecute. *Id.* at 1573. Julien's attorney, C. Emmet Pugh, was ordered to personally pay \$12,087 and \$1350 for a portion of the other parties' costs, expenses, and attorneys' fees. *Id.* at 1576. In the case, Pugh filed fourteen motions for extension of time and met one deadline. *Id.* at 1573.

51. MODEL RULES OF PROF'L CONDUCT R. 1.3.

52. 919 P.2d 323 (Idaho 1996).

53. *Id.* at 324.

54. *Id.* at 325, 327.

55. *Id.* at 325.

run by the time Tway filed the case in March of 1992.⁵⁶ Tway also committed some irregularities with the client's trust account and with regard to communicating with the client; at the time, Tway was suspended from practice because of other misconduct.⁵⁷ The Supreme Court of Idaho suspended Tway from practicing law for five years.⁵⁸

An attorney's failure to perform adequate and timely research not only harms clients, but also harms the judicial system. With their ever-increasing case loads, courts seem to deal more harshly with attorneys who file frivolous lawsuits. Cases in which attorneys were disciplined for failing to anchor the lawsuit to a basis in law and fact are discussed in the following section.

VI. BASIS IN LAW AND FACT

Rule 3.1 of the *Model Rules of Professional Conduct* requires that the attorney provide a legal and factual foundation for a lawsuit.⁵⁹ The rule provides in relevant part: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."⁶⁰ *Federal Rule of Civil Procedure* 11(b)(2) contains language similar in substance to the first sentence of rule 3.1 of the *Model Rules of Professional Conduct*.⁶¹ Rule 11 allows the federal court to impose severe sanctions.⁶²

Courts have resorted to a variety of remedies when faced with attorneys who file complaints that are groundless, or lack a factual basis. Attorneys have been ordered to pay opposing counsel's reasonable attorney's fees and attend continuing legal education classes on professionalism, the rules of

56. *Id.* at 324–25.

57. *Tway*, 919 P.2d. at 325–26.

58. *Id.* at 328.

59. MODEL RULES OF PROF'L CONDUCT R. 3.1.

60. *Id.* In *Federated Mutual Insurance Co. v. Anderson*, 920 P.2d 97 (Mont. 1996), the court sanctioned John Deere by ordering it to pay another party's reasonable costs and attorney's fees on appeal. *Id.* at 104. The sanctions were "on the basis of the inconsistent and conflicting positions John Deere has taken . . . its baseless claims on appeal, and its inaccurate citations in its appellate brief." *Id.* In *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990), the court refused to consider Zannino's arguments that were referenced briefly, yet not developed. "[W]e see no reason to abandon the settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." *Id.* The four co-defendants, who had been tried separately, had raised various arguments. *Id.* Zannino told the appellate court that he adopted their arguments as they applied to him. *Id.* The court refused to consider their arguments. *Id.*

61. Compare FED. R. CIV. P. 11 with MODEL RULES OF PROF'L CONDUCT R. 3.1.

62. FED. R. CIV. P. 11.

professional conduct, and substantive areas of law specific to the cases that were filed.

In *Balthazar v. Atlantic City Medical Center*,⁶³ attorney Branella filed a medical malpractice action in state court claiming that Balthazar's ureter was severed during a hysterectomy.⁶⁴ The state appellate court affirmed the dismissal of the case for the attorney's failure to file an affidavit of merit within the required 120-day period.⁶⁵ Branella subsequently filed a federal lawsuit based on the same facts of the state lawsuit in *Balthazar*.⁶⁶ The judge allowed Branella to amend his complaint but warned him that the judge might find Branella in violation of rule 11 if the amended complaint was based on the same facts as the prior state court lawsuit.⁶⁷ According to the court, Branella's amended complaint was "a rambling narrative, which is organized and drafted so poorly that it is often difficult to comprehend."⁶⁸

Federal Rule of Civil Procedure 11(b)(2) contains language similar in substance to the first sentence of rule 3.1 of the *Model Rules of Professional Conduct*.⁶⁹ In *Balthazar*, the federal judge found Branella in violation of rule 11(b)(2) for his failure to state a cognizable legal claim; the judge ordered Branella to complete a continuing legal education course on Federal Practice and Procedure and another on Attorney Professionalism and the Rules of Professional Conduct.⁷⁰

In *Carlino v. Gloucester City High School*,⁷¹ a number of high school students could not participate in graduation exercises because they became intoxicated on the senior class trip.⁷² Prior to the trip, the students had signed a statement saying that any student consuming alcoholic beverages on the trip would be excluded from graduation exercises and would possibly not graduate.⁷³ Malat, the students' attorney, filed a federal lawsuit claiming that the students' exclusion from graduation exercises violated the students' constitutional rights and caused them and their parents emotional distress.⁷⁴

63. 279 F. Supp. 2d 574 (D. N.J. 2003).

64. *Id.* at 578.

65. *Id.* at 579.

66. *Id.*

67. *Id.* at 594 n.18.

68. *Balthazar*, 279 F. Supp. 2d at 581.

69. Compare FED. R. CIV. P. 11(b)(2) with MODEL RULES OF PROF'L CONDUCT R. 3.1.

70. *Balthazar*, 279 F. Supp. 2d at 595.

71. No. 00-5262, 2002 WL 1877011, at *1 (3d Cir. 2002).

72. *Id.* at *1.

73. *Id.*

74. *Id.*

The district court found “a flagrant failure to conduct any legal research violates Mr. Malat’s obligations under rule 11(b).”⁷⁵ If Malat had performed “[e]ven a casual investigation, let alone [a] reasonable inquiry” he would have determined that a number of the claims were barred by statute.⁷⁶ The appellate court affirmed the trial court order that Malat complete two continuing legal education courses and pay a \$500 fine.⁷⁷

In *Brandt v. Schal Associates, Inc.*,⁷⁸ the appellate court affirmed an award of \$443,564.66 in attorneys’ fees and costs against plaintiff’s attorney.⁷⁹ The attorney filed a Racketeer Influenced and Corrupt Organizations Act (RICO) lawsuit and pursued the lawsuit for a number of years even though there were no facts to support it.⁸⁰

In addition to the requirement that the attorney provide a basis in law and fact, that basis must be true. Courts do not take kindly to finding that they have been presented with a false statement of law or fact.

VII. TRUE STATEMENT

Rule 3.3(a)(1) of the *Model Rules of Professional Conduct* prohibits an attorney from making a false statement to a court.⁸¹ The rule provides: “[a] lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.”⁸² In the following cases, attorneys were sanctioned or referred for disciplinary action when they misstated the facts.⁸³

In *Dube v. Eagle Global Logistics*,⁸⁴ the court sanctioned appellants’ law firm \$71,117.75, representing the attorney’s fees and costs Eagle incurred defending the appeal.⁸⁵ The court stated that the briefs prepared by

75. *Id.*

76. *Carlino*, 2002 WL 1877011, at *1.

77. *Id.* at *2. In *Vandeventer v. Wabash Nat’l Corp.*, 893 F. Supp. 827, 849-50 (N.D. Ind. 1995), the plaintiffs had claimed quid pro quo sexual harassment and repeated the claim numerous times even though the court found no factual or legal basis for the claim. “[T]he Attorneys were essentially ostriches who turned a blind eye to the law when they had no facts to support their claim—a blindness that persisted throughout.” *Id.* at 850. The court ordered the two plaintiffs’ attorneys sanctioned \$500 each or to attend a continuing legal education seminar “on the substantive provisions of sexual harassment.” *Id.* at 833.

78. 960 F.2d 640 (7th Cir. 1992).

79. *Id.* at 645, 652.

80. *Id.* at 642.

81. MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(1).

83. *Id.*

83. *Id.*

84. 314 F.3d 193, 195 (5th Cir. 2002), *vacated as moot* (5th Cir. Feb. 4, 2003).

85. *Id.*

the appellants' law firm were "noncompliant" as they "contained 'specious arguments' and had 'grossly distorted' the record through the use of ellipses to misrepresent the statements and orders of the district court."⁸⁶

In *Florida Breckinridge, Inc. v. Solvay Pharmaceuticals, Inc.*,⁸⁷ both parties were drug companies and in the lawsuit the attorneys "engaged in a pattern of practice designed to mislead and confuse the court regarding the regulatory status of their clients's [sic] drugs."⁸⁸ The court referred the matter to its disciplinary committee.⁸⁹

In *Hurlbert v. Gordon*,⁹⁰ the court sanctioned Hurlbert's attorneys \$750 for their "laissez-faire legal briefing."⁹¹ The numerous misstatements in the brief frustrated both the court and opposing counsel.⁹² "[N]umerous references to clerk's papers . . . were either non-existent, or difficult if not impossible to find, because of typographical errors in the references."⁹³ Also, "[o]n several occasions the pages cited were irrelevant to the factual statements for which the references were made."⁹⁴ In addition, "in several instances case citations contained typographical errors and in numerous other instances cases were cited which did not support the positions for which they were cited."⁹⁵

In *Sobol v. Capital Management Consultants, Inc.*,⁹⁶ the Supreme Court of Nevada sanctioned an attorney \$5000 because the attorney misrepresented a stipulated fact and quoted a portion of a case as if it were the case holding rather than language from the dissent.⁹⁷ The court termed these "statements of guile and delusion."⁹⁸

In *Precision Specialty Metals, Inc. v. United States*,⁹⁹ the United States Court of International Trade contemplated holding Department of Justice attorney Walser in contempt of court "for misquoting and failing to quote

86. *Id.* at 194-95.

87. *Fla. Breckenridge, Inc. v. Solvay Pharm., Inc.*, No. 98-4606, 1999 WL 292667, at *1 (11th Cir. May 11, 1999).

88. *Id.* at *9.

89. *Id.*

90. 824 P.2d 1238 (Wash. Ct. App. 1992).

91. *Id.* at 1245-46 (quotations omitted).

92. *Id.* at 1245.

93. *Id.*

94. *Id.*

95. *Hulbert*, 824 P.2d at 1245. The court found that the attorneys had violated a court rule that requires reference to the record. *Id.* "Virtually all of the factual statements made in the argument section of the brief were made without reference to the record . . ." *Id.*

96. 726 P.2d 335 (Nev. 1986).

97. *Id.* at 337.

98. *Id.*

99. 315 F.3d 1346 (Fed. Cir. 2003).

fully from two judicial opinions in a motion for reconsideration she signed and filed.”¹⁰⁰ In *Precision*, the government’s response to Precision’s motion for summary judgment was due by May 5, 2000.¹⁰¹ The day prior to the deadline, the government requested a thirty-day extension.¹⁰² The court denied the request on May 10 and ordered the government to file its response “forthwith.”¹⁰³ After the government filed its response on May 22, the court struck it as untimely.¹⁰⁴ Walser then filed a motion for reconsideration, which contained several quoted passages from cases in which the courts attempted to define the term “forthwith.”¹⁰⁵

The quoted passages in the motion for reconsideration omitted a citation to a 1900 United States Supreme Court case and a quotation from the case, “[i]n matters of practice and pleading [‘forthwith’] is usually construed, and sometimes defined by rule of court, as within twenty-four hours.”¹⁰⁶ The Court of Appeals for the Federal Circuit affirmed the lower court’s formal reprimand of Walser, stating: “She violated Rule 11 because, in quoting from and citing published opinions, she distorted what the opinions stated by leaving out significant portions of the citations or cropping one of them, and failed to show that she and not the court has supplied the emphasis in one of them.”¹⁰⁷

The obligation to perform adequate legal research carries with it the ethical requirement that the attorney must disclose adverse authority that the attorney knew or should have known. The following cases involve attorneys who knew or should have known of adverse authority because either the attorney or the attorney’s office previously had been involved in the case that was the basis of the adverse authority.

VIII. DISCLOSURE OF ADVERSE AUTHORITY

Rule 3.3(a)(2) of the *Model Rules of Professional Conduct* requires the attorney to disclose adverse authority to the court.¹⁰⁸ The rule provides: “A lawyer shall not knowingly . . . fail to disclose to the tribunal legal authority

100. *Id.* at 1347.

101. *Id.* at 1348.

102. *Id.*

103. *Id.*

104. *Precision Specialty Metals, Inc.*, 315 F.3d at 1348.

105. *Id.*

106. *Dickerman v. N. Trust Co.*, 176 U.S. 181, 193 (1900).

107. *Precision Specialty Metals, Inc.*, 315 F.3d at 1357.

108. MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(2).

in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.”¹⁰⁹

In *Massey v. Prince George's County*,¹¹⁰ the government attorney failed to disclose an adverse case in which the government had been a party.¹¹¹ The court ordered Prince George's County to show cause why it had not cited *Kopf v. Wing*,¹¹² an on-point case that was directly adverse to the county.¹¹³ The court found it “troublesome” that the county had also been a defendant in *Kopf*, but had failed to cite the case to the court.¹¹⁴ The court rejected the county's second answer to the order to show cause, that *Kopf* did not make new law and the *Kopf* facts are distinguishable from the *Massey* facts.¹¹⁵ The county also commented that the county attorney who handled *Kopf* was a different attorney than the attorney representing the county in *Massey*.¹¹⁶ The court responded that the attorney's failure to cite *Kopf* violated rules 1.1 and 1.3 in that the attorney had an obligation to “pursu[e] applicable legal authority in [a] timely fashion.”¹¹⁷

In a more disturbing case, the attorney failed to inform the court of a controlling, but adverse case.¹¹⁸ The court was understandably upset by this omission because the attorney had been counsel to one of the parties in the case.¹¹⁹ In *Nachbaur v. American Transit Insurance Co.*,¹²⁰ Nachbaur sued the driver's insurance company for injuries Nachbaur, while a pedestrian, allegedly received in an automobile accident.¹²¹ On appeal, the court stated that the pedestrian was not the intended beneficiary of the insurance policy and could not maintain an action alleging a bad faith breach of the insurance

109. *Id.* In *Northwestern Nat'l Ins. Co. v. Guthrie*, No. 90-C-04050, 1990 WL 205945, at *2 (N.D. Ill. Dec. 3, 1990), the court warned defense counsel of a near violation of the Illinois ethics rule equivalent of Model Rule 3.3. “This failure to disclose relevant legal authority borders perilously close to a violation of the legal profession's ethical canons.” *Id.* The attorney had cited to a line of cases discussing the rule of law but had failed to explain the exception to the rule, which was applicable to the case under consideration. *Id.* The attorney had quoted from a case but omitted the sentence following the quoted language, which discussed the exception to the rule of law. *Id.*

110. 918 F. Supp. 905 (D. Md. 1996).

111. *Id.* at 906.

112. 942 F.2d 265 (4th Cir. 1991).

113. *Massey*, 918 F. Supp. at 906.

114. *Id.*

115. *Id.* at 907–08.

116. *Id.* at 906–07.

117. *Id.* at 908.

118. *Nachbaur v. Am. Transit Ins. Co.*, 752 N.Y.S.2d 605, 607 (N.Y. App. Div. 2002), *appeal dismissed* 785 N.E.2d 730 (N.Y. 2003).

119. *Id.*

120. *Id.* at 605.

121. *Id.* at 606.

policy.¹²² The court chastised Moore, the plaintiff's attorney, for failure to cite to adverse authority.¹²³ "The failure is especially glaring in this case since plaintiff's attorney represented the losing appellant in *Bettan* . . . a Second Department case issued a matter of weeks before plaintiff's reply brief on the instant appeal was submitted, which precisely addresses five out of six of plaintiff's causes of action"¹²⁴

Courts have no difficulty punishing attorneys whose conduct is so blatantly unprofessional. In the heat of litigation, the attorney may be tempted to ridicule or impugn the integrity of opposing counsel. Such ad hominem attacks are unprofessional, if groundless, and also unethical, as discussed in the following section.

IX. STATEMENT CONCERNING OTHERS

Rule 4.4(a) of the *Model Rules of Professional Conduct* prohibits an attorney from making baseless accusations about others.¹²⁵ In the following case, the attorney was sanctioned for making groundless accusations against opposing counsel.¹²⁶ The rule provides: "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person."¹²⁷

122. *Id.*

123. *Nachbaur*, 752 N.Y.S.2d at 607.

124. *Id.* at 607. Failure to cite to adverse authority seems to have been the least of Moore's worries. Moore's conduct would be a violation of rules 1.1, 3.1, 3.3(a), 4.4(a), and 8.2(a). Moore failed to provide citations in his appellate brief and the court characterized the appeal as frivolous. *Id.* "The 4 1/2 and 3 1/2-page appellate briefs submitted by plaintiff's attorney, completely devoid of relevant discussion, are vividly reflective of the appeal's utter lack of even arguable merit." *Id.* In addition, Moore insulted opposing counsel, made unfounded allegations concerning the trial court, and made inaccurate statements concerning the record. *Id.* The court stated that:

[P]laintiff's attorney replicates the conduct sanctioned in the Supreme Court by repeating the insult directed at opposing counsel, adds to that insult with new invective, makes baseless, serious accusations against the motion court, makes unsupported accusations against defendant, seriously mischaracterizes the record and makes no reference to recent adverse authority.

Nachbaur, 752 N.Y.S.2d at 607. The appellate court affirmed sanctions of \$5000 against Moore and ordered Moore to pay defendant's reasonable attorneys' fees for defending against the appeal. *Id.* at 606.

125. MODEL RULES OF PROF'L CONDUCT R. 4.4(a).

126. *Thomas v. Tenneco Packaging Co.*, 293 F.3d 1306, 1308 (11th Cir. 2002).

127. MODEL RULES OF PROF'L CONDUCT R. 4.4(a).

Attorney Munson filed a federal lawsuit, *Thomas v. Tenneco Packaging Co.*,¹²⁸ claiming that Tenneco had discriminated against Thomas on the basis of his race.¹²⁹ At the trial level, Munson filed documents containing “insulting remarks about defense counsel’s physical traits and demeanor; remarks that called into question defense counsel’s fitness as a member of the bar; thinly veiled physical threats directed at defense counsel; a racial slur; and unsubstantiated claims that defense counsel was a racist.”¹³⁰ The district court censured and reprimanded Munson.¹³¹ In addition, the court ordered any further similar documents filed by Munson were to be stricken, after notice and opportunity for hearing.¹³²

On appeal, the Court of Appeals for the Eleventh Circuit affirmed what the district court had done under its inherent power, noting that Munson had “exhibited a pattern of baseless accusations and invective.”¹³³ In addition, the court noted that in Munson’s appellate brief, she had “made insulting and demeaning remarks about the district judge, such as by calling him ‘a protectorate of white America.’”¹³⁴ One of the ethics rules referenced by the Eleventh Circuit was rule 4.4 of the *Georgia Rules of Professional Conduct*,¹³⁵ which is identical in wording to rule 4.4 of the *Model Rules of Professional Conduct*.¹³⁶

Almost unimaginable is the practice of some attorneys of making baseless accusations about a judge. This conduct is an ethics violation, as discussed in the following section.

X. STATEMENT REGARDING JUDGE

Rule 8.2(a) prohibits an attorney from impugning the integrity of the judge or other court personnel.¹³⁷ The rule provides: “A lawyer shall not

128. 293 F.3d 1306 (11th Cir. 2002).

129. *Id.* at 1308.

130. *Id.* at 1331.

131. *Id.* at 1308.

132. *Id.* at 1329.

133. *Thomas*, 293 F.3d at 1331.

134. *Id.* This conduct could have violated the ethics rule discussed in the following section.

135. *Id.* at 1323.

136. See MODEL RULES OF PROF’L CONDUCT R. 4.4(a); GA. RULES OF PROF’L CONDUCT R. 3.1(a).

137. MODEL RULES OF PROF’L CONDUCT R. 8.2(a). In *Henry v. Eberhard*, 832 S.W.2d 467, 474 (Ark. 1992), the court struck a number of pages from the appellants’ brief because the pages contained “inflammatory and disrespectful” statements concerning the lower courts. In *State v. Rossmannith*, 430 N.W.2d 93, 94 (Wis. 1988), the Supreme Court of Wisconsin did not sanction the appellant’s attorney, although it could have for disparaging the lower court.

make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer"¹³⁸

In *In re Wilkins*,¹³⁹ the Supreme Court of Indiana decided that attorney Wilkins should be suspended from the practice of law because of language in a brief.¹⁴⁰ In his brief, which supported a petition to transfer the case to the Supreme Court of Indiana, Wilkins criticized the lower court.¹⁴¹ A portion of the text of the brief stated:

The Court of Appeals' published Opinion in this case is quite disturbing. It is replete with misstatements of material facts, it misapplies controlling case law, and it does not even bother to discuss relevant cases that are directly on point. Clearly, such a decision should be reviewed by this Court. Not only does it work an injustice on appellant Michigan Mutual Insurance Company, it establishes dangerous precedent in several areas of the law. This will undoubtedly create additional problems in future cases.¹⁴²

The last sentence of the above-quoted text was footnoted at note 2.¹⁴³ Note 2 stated: "Indeed, the Opinion is so factually and legally inaccurate that one is left to wonder whether the Court of Appeals was determined to find for Appellee Sports, Inc., and then said whatever was necessary to reach that conclusion (regardless of whether the facts or the law supported its decision)."¹⁴⁴

In *Notopoulos v. Statewide Grievance Committee*,¹⁴⁵ an attorney accused a judge of improprieties regarding the attorney's mother's estate.¹⁴⁶

When the attorney appealed the lower court's decision to the Supreme Court of Wisconsin, the attorney fashioned the petition as a letter to the lower court:

You are probably quite smug about your decision in this case You *think* you managed to avoid deciding the case all together. Sorry I can't congratulate you on this clever evasion of a precedential statutory interpretation. This may come as something of a shock, but you *didn't* avoid an interpretation of the insanity law with a major impact in this state If all of this seems theoretical, think again I will, of course, ask the supreme court to grant review. But between you and me, that should not be necessary. You should withdraw your decision in this case You should do the job yourselves.

Id. at 93 n.2.

138. MODEL RULES OF PROF'L CONDUCT R. 8.2(a).

139. 777 N.E.2d 714 (Ind. 2002), *stay granted*, 778 N.E.2d 1290 (Ind. 2002).

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at n.2.

144. *Wilkins*, 777 N.E.2d at 715-16.

145. No. CV010510911S, 2003 WL 22293599, at *1 (Conn. Super. Ct. Sept. 24, 2003).

146. *Id.*

The attorney was sanctioned by reprimand even though the attorney was not representing a party to the case.¹⁴⁷ Attorney Joseph Notopoulos formerly had some disagreements with Judge Berman regarding Notopoulos's mother's estate.¹⁴⁸ After the case was concluded, Notopoulos sent a letter to a member of the court staff criticizing Judge Berman.¹⁴⁹ The attorney claimed that Judge Berman "has clearly prostituted the integrity of his office and is presently running it as a financial spoils system for [his] cronies."¹⁵⁰ The attorney stated that:

[H]ardly all-inclusive of these abuses is his reprehensible extortion from the undersigned, without legal authority, of money for his crony[,] . . . resorting to threats to impose upon the undersigned a substantial conservator's cash bond or to dispatch a psychiatrist to our residence to examine my mother and bill the estate . . .¹⁵¹

The attorney claimed that the judge placed "the financial greed of his cronies above my mother's best interest and welfare with utter contempt for applicable requirements of the Connecticut General Statutes to act in her best interest."¹⁵² The attorney added that "[b]ecause Mr. Berman has become not merely an embarrassment to this community but a demonstrated financial predator of its incapacitated and often dying elderly whose interests he is charged with the protection," the attorney asked that the judge resign.¹⁵³

Notopoulos was charged with violating rules 8.2(a) and 8.4(4) of the *Connecticut Rules of Professional Conduct*.¹⁵⁴ On appeal, the court disagreed with Notopoulos's argument that he could not have violated rule 8.2(a) because he was acting in his individual capacity as a relative rather than in his representative capacity as an attorney.¹⁵⁵ The court found that the rule applies to an attorney, even when the attorney is not representing a client.¹⁵⁶ The court also found that Notopoulos had violated rules 8.2(a) and

147. *Id.* at *3.

148. *Id.* at *1.

149. *Id.*

150. *Notopoulos*, 2003 WL 22293599, at *1.

151. *Id.*

152. *Id.*

153. *Id.* The language of rule 8.4(4) of the state rules coincides with rule 8.4(d) of the Model Rules. Rule 8.4 of the Model Rules is discussed in the following section.

154. *See id.* Notopoulos had been charged under rule 3.5(3) with disrupting a tribunal. *Notopoulos*, 2003 WL 22293599, at *1. The court found that Notopoulos had not violated rule 3.5(3) because there was no clear and convincing evidence that he had intended to disrupt a tribunal. *Id.* at *5.

155. *Id.* at *3.

156. *Id.*

8.4(4) because there was no basis in fact for the allegations against the judge in Notopoulos's letter.¹⁵⁷

False statements, baseless allegations, and misrepresentations of fact are parallel to the theft of another person's work through plagiarism. Plagiarism committed by an attorney reflects poorly on the legal profession and is contrary to the ethics rules. The following section discusses a case in which an attorney was sanctioned for plagiarism.

XI. HONESTY

Rule 8.4 of the *Model Rules of Professional Conduct* requires the attorney to refrain from conduct reflecting adversely on the attorney's position as an officer of the court.¹⁵⁸ In the following case, the attorney violated the rule by plagiarizing a major portion of a brief filed with the court.¹⁵⁹ The rule provides in relevant part:

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice.¹⁶⁰

In *Iowa Supreme Court Board of Professional Ethics & Conduct v. Lane*,¹⁶¹ attorney Lane submitted a post-trial brief to the court and requested \$16,000 in attorney's fees for writing the brief.¹⁶² Later it was discovered that Lane plagiarized a treatise in writing the brief.¹⁶³ "The legal argument of Lane's post-trial brief consisted of eighteen pages of plagiarized material, including both text and footnotes, from the treatise . . . Lane cherry-picked the relevant portions and renumbered the footnotes to reflect the altered

157. *Id.* at *4-5.

158. See MODEL RULES OF PROF'L CONDUCT R. 8.4.

159. See *Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Lane*, 642 N.W.2d 296 (Iowa 2002).

160. MODEL RULES OF PROF'L CONDUCT R. 8.4.

161. 642 N.W.2d 296.

162. *Id.* at 298.

163. *Id.* at 298-99.

text.”¹⁶⁴ The similarity between the treatise and the brief was so great that the “brief does not reveal any independent labor or thought in the legal argument.”¹⁶⁵

The Ethics Board charged Lane with violating the state ethics rule that is similar in wording to subsections (b), (c), and (d) of rule 8.4 of the *Model Rules of Professional Conduct*.¹⁶⁶ The Ethics Board recommended a three month suspension for Lane from the practice of law; however, the Supreme Court of Iowa suspended Lane for six months because Lane had “jeopardized the integrity of the Bar and the public’s trust in the legal profession.”¹⁶⁷

XII. ANALYSIS OF A CASE WITH A COMBINATION OF ETHICAL ERRORS

*Bradshaw v. Unity Marine Corp.*¹⁶⁸ is a case that illustrates a number of deficiencies in the attorneys’ performance. In the case, seaman Bradshaw

164. *Id.* at 300.

165. *Id.* Lane was not an isolated incident, and other courts have dealt with attorneys who plagiarized. In *In re Harper*, 645 N.Y.S.2d 846, 847 (N.Y. App. Div. 1996), Harper enrolled in an L.L.M. program at Pace University School of Law. Harper plagiarized a research paper in one of his classes by submitting a published article as his own writing. *Id.* Because of Harper’s remorse, Harper’s otherwise good reputation, and the fact that the plagiarism was a single incident, the court censured Harper. *Id.* at 847–48. In *In re Hinden*, 654 A.2d 864, 865 (D.C. 1995), Hinden had already been censured by the Supreme Court of Illinois for plagiarizing, by incorporating twenty-three pages of an article word-for-word into Hinden’s chapter in a treatise. The District of Columbia Court decided to censure Hinden also. *Id.* In *In re Steinberg*, 620 N.Y.S.2d 345, 346 (N.Y. App. Div. 1994), Steinberg submitted two writing samples, a requirement of the New York Court of Appeals to be appointed to represent those charged with felonies. When it was discovered that the writing samples were not his, Steinberg was publicly censured. *Id.* In *In re Zbiegien*, 433 N.W.2d 871, 872 (Minn. 1988), Zbiegien plagiarized almost all of twelve pages of a research paper he wrote for his fourth year in law school by including passages of law review articles without crediting the sources. The court considered the plagiarism a “single incident” and decided that the incident would not keep Zbiegien from being admitted to the bar. *Id.* at 877. In *In re Lamberis*, 443 N.E.2d 549, 550 (Ill. 1982), attorney Lamberis enrolled in an LL.M. program at Northwestern University School of Law. Pages thirteen through fifty-nine of his ninety-three page master’s thesis incorporated portions of two books without crediting the authors. *Id.* Northwestern expelled Lamberis. *Id.* at 550–552. Before the Supreme Court of Illinois, Lamberis argued that he should not be disciplined because he was not practicing law when the incident occurred. *Id.* at 551. The court disagreed and decided that Lamberis should be censured. *Id.* at 551–553. In *Frith v. State*, 325 N.E.2d 186, 188 (Ind. 1975), Frith’s brief contained a collection of material plagiarized from other sources, including ten pages of an American Law Reports annotation. The court briefly mentioned the plagiarism and moved on to consider the rest of the case, noting that attorneys’ fees may take the plagiarism into account. *Id.* at 188–89.

166. *Lane*, 642 N.W.2d at 299.

167. *Id.* at 297, 302.

168. 147 F. Supp. 2d 668 (S.D. Tex. 2001).

alleged that he had been injured while working on a ship docked at Phillips Petroleum Company's dock.¹⁶⁹ Bradshaw sued his employer, Unity Marine, within two years of the injury and sued Phillips within three years of the injury.¹⁷⁰ The case came before the court on Phillips' motion for summary judgment in which Phillips claimed that the action against Phillips was barred by the state law two-year statute of limitations rather than the maritime law three-year statute of limitations.¹⁷¹

Bradshaw provided no details about the type of injury he incurred or how he was injured.¹⁷² Phillips failed to support its motion with relevant authority as to why the two-year statute of limitations applied and provided no legal analysis of its argument.¹⁷³ In response, Bradshaw failed to direct the court to relevant case law, gave an incorrect citation, lacked a pinpoint reference to a case that was not on-point, and failed to provide legal analysis of Bradshaw's claim against Phillips.¹⁷⁴

The court quickly resolved the motion for summary judgment by citing to two cases from the Court of Appeals for the Fifth Circuit.¹⁷⁵ Those cases stated that any duty of the dock owner to the seaman is under state law and not maritime law.¹⁷⁶ Based on those cases, the court concluded that the Texas two-year statute of limitations would apply and granted Phillips's motion for summary judgment.¹⁷⁷

The attorneys had the bad luck of being before Samuel B. Kent, a federal judge for the Southern District of Texas.¹⁷⁸ Judge Kent has been nicknamed "Judge Seinfeld" for his humorous legal opinions.¹⁷⁹ The word "criticism" is mild compared to what Judge Kent metes out to the attorneys.¹⁸⁰ "[T]his case involves two extremely likable lawyers, who have together delivered some of the most amateurish pleadings ever to cross the hallowed causeway into Galveston"¹⁸¹ The judge explains that the:

169. *Id.* at 669.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Bradshaw*, 147 F. Supp. 2d at 671–72.

174. *Id.* at 670–71.

175. *Id.* at 671.

176. *Id.*

177. *Id.* at 671–72.

178. *Bradshaw*, 147 F. Supp. 2d at 669.

179. Jenny B. Davis, *The Limelight Rules: Some Celebrity Judges Just Can't Help Getting Big Heaps of Attention*, 88 A.B.A. J. 28, 28 (Apr. 2002).

180. *See Bradshaw*, 147 F. Supp. 2d at 668.

181. *Id.* at 670.

[A]ttorneys have obviously entered into a secret pact—complete with hats, handshakes and cryptic words—to draft their pleadings entirely in crayon on the back sides of gravy-stained paper place mats, in the hope that the Court would be so charmed by their child-like efforts that their utter dearth of legal authorities in their briefing would go unnoticed.¹⁸²

The judge explained relevant case law regarding whether state law or maritime law applied in one paragraph.¹⁸³ This contrasts with the attorneys who were unable to provide relevant law and legal analysis.¹⁸⁴ “Take heed and be suitably awed, oh boys and girls—the Court was able to state the issue and its resolution in one paragraph . . . despite dozens of pages of gibberish from the parties to the contrary!”¹⁸⁵ In the following paragraph, Judge Kent concluded that the two-year statute of limitations applied and granted Phillips’s motion for summary judgment.¹⁸⁶ “[H]aving received no useful guidance whatever from either party, the Court has endeavored, primarily based upon its affection for both counsel, but also out of its own sense of morbid curiosity, to resolve what it perceived to be the legal issue presented.”¹⁸⁷

Even though the propriety of Judge Kent’s opinion may be questioned,¹⁸⁸ *Bradshaw* received wide circulation on the Internet and was published in *Legal Times*.¹⁸⁹ From *Bradshaw*, one may glean that the performance of the attorneys was deficient in a number of respects.¹⁹⁰ They apparently failed to perform adequate research, and their writing was deficient.¹⁹¹ Neither attorney developed the analysis of the legal argument.¹⁹² *Bradshaw*’s attorney failed to provide basic facts concerning *Bradshaw*’s injury,

182. *Id.*

183. *Id.* at 671–72.

184. *Id.* at 670–71.

185. *Bradshaw*, 147 F. Supp. 2d at 672 n.3.

186. *Id.* at 672.

187. *Id.*

188. Steven Lubet, *Bullying from the Bench*, 5 GREEN BAG 2d 11, 11 (2001). Professor Lubet claimed that Judge Kent engaged in bullying. *Id.* at 12. “By belittling the lawyers who appear before him, Judge Kent used his authority to humiliate people who—in the courtroom environment—are comparatively powerless.” *Id.* at 12. “[L]aughter at the ill fate of others—even when they are bunglers—just enables further victimization. Judge Kent, and others like him, need to know that ridicule isn’t funny. It’s just mean. It isn’t judging, it’s just showing off.” *Id.* at 16.

189. *Id.* at 11 n.1.

190. *See Bradshaw*, 147 F. Supp. 2d at 670–72.

191. *Id.* at 670–71.

192. *Id.*

provided an incorrect case citation, and omitted a pinpoint reference to relevant material in a forty-page brief.¹⁹³

The *Bradshaw* attorneys faced humiliation, but they also could have faced discipline for violating some of the ethics rules discussed in this article.¹⁹⁴

XIII. CONCLUSION

Although seemingly minor, grammatical errors may indicate that there is a problem with the substance of the document, and more scrutiny is warranted. The attorney's stock in trade is a good reputation, and problems with legal research or errors in citation may contribute to the attorney's loss of credibility. The examples of ethics violations contained in this article show that even tiny problems with legal research and legal writing leave the attorney open for ethics violations.

Imagine the attorney's chagrin at reading a case in which the attorney was sanctioned and knowing that the case is a lasting legacy, to be read by generations of attorneys. One court gave the following career advice: "The Attorneys should give serious consideration to not practicing in the United States District Court until such time as they have demonstrably enhanced their practice skills."¹⁹⁵ Imagine the client reading one of these cases. The client would be bound to lose faith in the attorney and may feel that a legal malpractice lawsuit is warranted. As far as the public is concerned, the attorney's conduct reflects poorly on the legal system.

The majority of attorneys conduct themselves ethically. They faithfully perform any necessary legal research and try to write well. As shown by the cases discussed in this article, however, there are a number of attorneys whose legal research and writing falls below the standard expected by the client and the court.

To a diligent, ethically-minded attorney, the acts discussed in this article for which attorneys were disciplined are almost unimaginable. This conduct represents one end of the spectrum. Even so, the competent attorney should be mindful of these cases and take them as a reminder of the legal research and legal writing obligations owed the client and the court. Often, an attorney is pressured by a looming deadline or by the client to take shortcuts. Skimping on research or writing can lead to ethics violations. A momentary lapse of good judgment may place an attorney in the same predicament.

193. *Id.* at 670–71.

194. MODEL RULES OF PROF'L CONDUCT R. 8.4; *Bradshaw*, 147 F. Supp. 2d at 670–72.

195. *Vandevanter*, 893 F. Supp. at 859 n.43.

As an officer of the court, the attorney owes a duty to the judge. Courts attempt to make the right decisions and rely on attorneys to provide the court with information. This relationship is subverted by the attorney who does not fulfill his or her obligation to perform adequate legal research and write well. An officer of the court should help the judge, and not add to the judge's workload. When reading the cases cited in this article, one can feel the frustration of the court.

The duty to the client is to provide the best representation possible. Obviously, the attorneys in the cases cited in this article performed a disservice to their clients by providing substandard representation. In addition, poor attorney performance damages the public's respect for the legal system.

THE POWER OF INTERLOCUTORY APPEALS: DEFINING THE ESSENCE OF PERSONAL JURISDICTION THROUGH THE SCOPE OF APPELLATE JURISDICTION

CHRISTOPHER SPRAGUE*

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I. INTRODUCTION

The issue of jurisdiction is an essential legal question. “The foundation of jurisdiction is physical power.”¹ When a court lacks jurisdiction, it is void of the inherent power to decide a case.² One particular form of jurisdiction,

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1. McDonald v. Mabee, 243 U.S. 90, 91 (1917).

2. Johnson v. McKinnon, 45 So. 23, 25 (Fla. 1907). Early Roman notions of jurisdictional procedure were by “voluntary” submission. Albert A. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The “Power” Myth and Forum Conveniens*, 65 YALE L.J. 289, 296 (1956). “Inducement and force” were the jurisdictional tools of later Roman courts. *Id.* Ju-

personal jurisdiction, has been a topic of controversy and litigation since before courts existed in America.³ The primary inquiry involved in these disputes is whether the court has the power to hale a particular defendant into that court, subject them to proceedings, and enforce the will of the court and the court's judgment upon him or her.⁴

However, as complicated as personal jurisdictional issues may become, when these controversies intersect with other jurisdictional issues, the scope of the litigation tends to become even more confusing and problematic. Indeed, another form of jurisdiction which may add to this morass is appellate jurisdiction. "Appellate jurisdiction is the power to take cognizance of and review proceedings in an inferior court"⁵ Thus, when issues of personal jurisdiction intersect and collide with issues of appellate jurisdiction, the difficulties faced by litigants and courts are amplified.

In *Thomas v. Silvers*,⁶ the Supreme Court of Florida faced such a tangled web.⁷ This paper will focus on *Thomas* and its interpretation of the intersection of personal jurisdiction and appellate jurisdiction. The procedural technicalities underlying the legal framework for the *Thomas* decision are intricate, and therefore it is necessary to provide substantial background on the relevant law. Thus, part II of this paper will summarize the substantive elements of personal jurisdiction and their relation to service of process. Part II will also illustrate essential differences in the nature of motions to quash service. Part III of this paper will briefly summarize the history and purpose of the intermediate courts in Florida, the district courts of appeal. Additionally, part III will examine the scope of appellate jurisdiction in Florida. Part IV of this paper will discuss the mechanics of the writ of certiorari and the interlocutory appeal, and will demonstrate how these tools are used in connection with issues of personal jurisdiction. Part V of this paper will assess the case history behind the ultimate decision in *Thomas* by exploring the delicate balance between appellate jurisdiction and personal jurisdiction, and

isdiction in American courts is based on the Constitution of the United States. See U.S. CONST. art. III, § 2.

3. Joseph J. Kalo, *Jurisdiction as an Evolutionary Process: The Development of Quasi in Rem and In Personam Principles*, 1978 DUKE L.J. 1147, 1148 (1978).

4. Richard W. Garnett, *Once More Into the Maze: United States v. Lopez, Tribal Self-Determination, and Federal Conspiracy Jurisdiction in Indian Country*, 72 N.D. L. REV. 433, 438 (1996) (citing *A-1 Contractors v. Strate*, 76 F.3d 930, 944 (8th Cir. 1996)) (Gibson, J., dissenting) (noting in the dissent that "the power to adjudicate everyday disputes occurring within a nation's own territory is among the most basic and indispensable manifestations of sovereign power").

5. *Williams v. State ex rel. Nuccio*, 122 So. 523, 524 (Fla. 1929).

6. 748 So. 2d 263 (Fla. 1999).

7. *Id.*

how subtle decisions in one realm can produce adverse, unforeseen effects in the other. Part VI of this paper will focus on *Thomas* itself, and will explain how the Supreme Court of Florida resolved the conflict between the district courts of appeal. Specifically, part VI will look to a recent amendment to the *Florida Rules of Civil Procedure* and show how this change makes the decision in *Thomas* an equitable one. Finally, part VI will explore additional policy reasons supporting the Supreme Court of Florida's decision in *Thomas*. Part VII will conclude by stating that *Thomas* was correctly decided because time limits for service should not be construed as an essential element of personal jurisdiction.

II. PERSONAL JURISDICTION

A. *Service of Process and Its Relation to Personal Jurisdiction*

"Jurisdiction is simply power."⁸ A primary form of territorial jurisdiction is personal, or in personam, jurisdiction.⁹ Personal jurisdiction is the power of a court to compel a party to litigate and enforce judgment upon that party in that particular forum.¹⁰ Under *Garrett v. Garrett*,¹¹ Florida's "power to exercise personal jurisdiction is limited by the Due Process Clause of the Fourteenth Amendment to the United States Constitution."¹² For a court to have personal jurisdiction over a party in Florida, the party must meet certain criteria.

These criteria are: 1) being physically present in the state of Florida;¹³ 2) having status as a Florida domiciliary;¹⁴ 3) having previously agreed to

8. *Johnson*, 45 So. at 25.

9. GEOFFREY C. HAZARD, JR. ET AL., *PLEADING AND PROCEDURE: STATE AND FEDERAL* 175 (Univ. Casebook Series ed., 8th ed. 1999). The other major forms of territorial jurisdiction are in rem jurisdiction and quasi in rem jurisdiction. *Id.* These forms of territorial jurisdiction concern property. *Id.* Although each is important in their own right, a discussion of these forms of jurisdiction is outside the scope of this discussion.

10. *Johnson*, 45 So. at 25.

11. 668 So. 2d 991 (Fla. 1996).

12. *Id.* at 993 (citing *Asahi Metal Indus. Co. v. Super. Ct. of Cal.*, 480 U.S. 102, 108 (1987)).

13. See generally *Wendt v. Horowitz*, 822 So. 2d 1252, 1257-58 (Fla. 2002) (discussing acts which subject a party to personal jurisdiction in Florida in the absence of physical presence); see also *Burnham v. Super. Ct. of Cal.*, 495 U.S. 604, 619 (1990) (holding that a California court's exertion of personal jurisdiction over a defendant who was physically present "constitutes due process").

14. *Perez v. Perez*, 164 So. 2d 561, 562 (Fla. 3d Dist. Ct. App. 1964) (noting that to establish domicile for the purpose of asserting personal jurisdiction, the defendant must have a

submit to jurisdiction by contract;¹⁵ 4) waiving objections to the assertion of jurisdiction;¹⁶ 5) submitting voluntarily to jurisdiction;¹⁷ or 6) possessing minimum contacts.¹⁸ The minimum contacts test in Florida is somewhat elaborate and requires further explanation.

Under *International Shoe Co. v. Washington*,¹⁹ a prospective party must have "certain minimum contacts with [Florida] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"²⁰ An additional requirement under *International Shoe Co.* is articulated in *World-Wide Volkswagen Corp. v. Woodson*.²¹ Under *Woodson*, a court can assert personal jurisdiction over a defendant when the defendant "purposefully avails"²² himself or herself of the laws of Florida and when the assertion of personal jurisdiction is "reasonable."²³ Finally, the court will apply the balancing test provided by *Burger King Corp. v. Rudzewicz*.²⁴ This test evaluates: 1) "the burden on the defendant"; 2) "the forum State's interest in adjudicating the dispute"; 3) "the plaintiff's interest in obtaining convenient and effective relief"; 4) "the interstate judicial system's interest in obtaining the most efficient resolution of controversies"; and 5) "the shared

residence in Florida coupled with the intent to remain in Florida or for an "indefinite period") (citations omitted)).

15. *Vacation Ventures, Inc. v. Holiday Promotions, Inc.*, 687 So. 2d 286, 288–89 (Fla. 5th Dist. Ct. App. 1997) (cautioning that although parties may subject themselves to personal jurisdiction through contract, forum selection clauses must also satisfy Florida's long-arm statute and meet the minimum contacts test).

16. FLA. R. CIV. P. 1.140(h)(2) (ordering that a jurisdictional defense is waived unless raised by motion, answer, or reply).

17. *Beverly Beach Props., Inc. v. Nelson*, 68 So. 2d 604, 608 (Fla. 1953) (noting that the assertion of personal jurisdiction may be acquired through the voluntary appearance of a party).

18. *Harris v. Shuttleworth & Ingersoll, P.C.*, 831 So. 2d 706, 708 (Fla. 4th Dist. Ct. App. 2002) (citing *Venetian Salami Co. v. Parthenais*, 554 So. 2d 499, 502 (Fla. 1989)) (noting that the federal due process test for minimum contacts must be satisfied for the assertion of personal jurisdiction).

19. 326 U.S. 310 (1945). Since Florida courts are bound by decisions from the United States Supreme Court, these tests have been adopted in Florida. See *Nat'l Alcoholism Programs v. Slocum*, 648 So. 2d 234, 236 (Fla. 4th Dist. Ct. App. 1994) (citing *Venetian Salami Co. v. Parthenais*, 554 So. 2d 499, 502 (Fla. 1989)) (holding that the requirements of the minimum contacts test and Florida's long-arm statute must be satisfied for the assertion of personal jurisdiction over a non-resident defendant).

20. *Int'l Shoe Co.*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

21. 444 U.S. 286 (1980).

22. *Id.* at 297 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

23. *Id.* at 292 (quoting *Int'l Shoe Co.*, 326 U.S. at 317).

24. 471 U.S. 462, 477 (1985).

interest of the several States in furthering fundamental substantive social policies.”²⁵

As this “minimum contacts” test is applied to non-resident defendants, there is an additional requirement. Courts must look to Florida’s long-arm statute²⁶ to determine whether the assertion of personal jurisdiction over the defendant is legislatively authorized.²⁷ Not only must it be fair to subject a prospective party to a suit in Florida, but this prospective party must also be informed of the pending litigation.

In order to be informed of the pending litigation, the party must be properly served.²⁸ In the absence of proper service of process, a judgment is void.²⁹ The Supreme Court of Florida held that “the real purpose of the service of summons ad respondendum is to give proper notice to the defendant in the case that he is answerable to the claim of plaintiff *and, therefore, to vest jurisdiction in the court entertaining the controversy.*”³⁰ In *Bedford Computer Corp. v. Graphic Press, Inc.*,³¹ the Supreme Court of Florida held that

[t]he object of process is to warn the defendant that an action or proceeding has been commenced against him by the plaintiff, that he must appear within a time and at a place named and make such defense as he has, and that, in default of his so doing, a judgment will be asked or taken against him in a designated sum or for the other relief specified.³²

25. *Id.* (quoting *Woodson*, 444 U.S. at 292).

26. FLA. STAT. § 48.193 (2003).

27. *Execu-Tech Bus. Sys., Inc. v. New Oji Paper Co.*, 752 So. 2d 582, 584 n.4 (Fla. 2000) (noting assertion of personal jurisdiction over non-resident defendant must fall within statutorily proscribed provision of section 48.193 of the *Florida Statutes*).

28. *Valdosta Milling Co. v. Garretson*, 54 So. 2d 196, 197 (Fla. 1951).

29. *Id.* (holding “[n]otice and an opportunity to defend is fundamental in our jurisprudence”); *see also* *Taylor v. Bowles*, 570 So. 2d 1093, 1094 (Fla. 4th Dist. Ct. App. 1990) ((citing *Li v. Li*, 442 So. 2d 327, 328 (Fla. 4th Dist. Ct. App. 1983)) (holding “[w]hen a party has no notice of a trial date, the trial court abuses its discretion when it proceeds with a final hearing and enters final judgment”)).

30. *Klosenski v. Flaherty*, 116 So. 2d 767, 768 (Fla. 1959) (alteration in original) (quoting *State ex rel. Merritt v. Heffernan*, 195 So. 145, 147 (Fla. 1940)); *see also* *Shepard v. Kelly*, 2 Fla. 634, 655 (1849) (“[A] summons, regularly served, as required by the [statute or rules], gives the court jurisdiction of the person of the defendant.”).

31. 484 So. 2d 1225 (Fla. 1986).

32. *Id.* at 1227 (citing *Gribbel v. Henderson*, 10 So. 2d 734, 739 (Fla. 1942)). *See also* *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (“An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the

Thus, the form of service of process is also significant as it is central to process' purpose: notice.³³ When a party believes that service of process has not been perfected in compliance with the relevant provisions, the party may file a motion to quash service.

B. *Essential Differences in the Nature of Motions to Quash Service*

In Florida, motions to quash service of process may be filed either in an answer or before a responsive pleading.³⁴ As one of the seven enumerated defenses of rule 1.140(b)³⁵ of the *Florida Rules of Civil Procedure*, the defense of "lack of jurisdiction over the person"³⁶ may be raised by motion. Pursuant to section 48.031(1)(a)³⁷ of the *Florida Statutes*,

[s]ervice of original processes is made by delivering a copy of it to the person to be served with a copy of the complaint, petition, or other initial pleading or paper or by leaving the copies at his or her usual place of abode with any person residing therein who is 15 years of age or older and informing the person their contents. Minors who are or have been married shall be served as provided in this section.³⁸

As previously discussed, service of process is an essential element of personal jurisdiction. Without valid service, the court cannot exercise jurisdiction over the person.³⁹ Thus, when service of process does not purportedly comply with the relevant procedural guidelines of the *Florida Rules of Civil Procedure*, the issue of "lack of jurisdiction over the person"⁴⁰ is validly raised. These motions to quash service allege deficiencies in the purported service of process upon the party.⁴¹ Yet in the realm of jurisdiction

pendency of the action and afford them an opportunity to present their objections." (citations omitted)).

33. *Bedford Computer Corp.*, 484 So. 2d at 1227. Personal service is the preferred form of service of process. *Id.* The *Florida Statutes* also provide for substitute service, but it is less preferred because it is less likely to effect the goal of process. *Id.*

34. *See Viking Superior Corp. v. W.T. Grant Co.*, 212 So. 2d 331, 334 (Fla. 1st Dist. Ct. App. 1968) (noting that express statutory construction of rule 1.140 authorizes defenses to service of process to be made prior to a responsive pleading).

35. FLA. R. CIV. P. 1.140(b).

36. FLA. R. CIV. P. 1.140(b)(2).

37. FLA. STAT. § 48.031(1)(a) (2003).

38. *Id.*

39. *See Klosenski v. Flaherty*, 116 So. 2d 767, 768 (Fla 1959).

40. FLA. R. CIV. P. 1.140(b)(2).

41. FLA. R. CIV. P. 1.140(b) ("The grounds on which any of the enumerated defenses . . . shall be stated specifically and with particularity in the responsive pleading or motion.").

over the person, these allegations of insufficiency of process span a wide scope of legal reasoning.

On the one hand, the alleged deficiencies pursuant to section 48.031(2)(a)⁴² of the *Florida Statutes* might point to the fact that the defendant was improperly served because the process was delivered to an address where the defendant did not reside.⁴³ Likewise, the deficiency alleged could be that a person not authorized to accept service on behalf of the defendant was served and therefore, the purported service was invalid.⁴⁴ On the other hand, the alleged deficiency could be that the plaintiff failed to serve the defendant within the 120-day time limit as provided by rule 1.070(j).⁴⁵

All of these alleged deficiencies, if proven, would violate a provision of the *Florida Rules of Civil Procedure* and could warrant service of process to be quashed.⁴⁶ This paper will argue that violating the time requirement of rule 1.070(j)⁴⁷ is fundamentally different from violating the other provisions. Rule 1.070(j)⁴⁸ is different because it fails to go to the essential requirement of service of process: notice. The fact that service is late pursuant to rule 1.070(j)⁴⁹ does not mean that the party did not receive notice. It is simply late notice. In contrast, the other violations mentioned all go to the essential nature of service of process. A party who is unauthorized to receive service of process may have an ulterior motive. Specifically, an estranged husband may not inform the former wife of the pending litigation.⁵⁰ Likewise, delivering service upon someone who is unauthorized by section 48.031(2)(a)⁵¹ to receive service goes to the essence of notice because the unauthorized person may neither appreciate the gravity of the documents nor care about the potential defendant's welfare. In turn, the unauthorized person may not inform the true party against whom the litigation is pending.

42. § 48.031(2)(a) ("Substitute service may be made on the spouse of the person to be served . . . if the spouse and person to be served are residing together in the same dwelling.").

43. *Montero v. DuVal Fed. Sav. & Loan Ass'n of Jacksonville*, 581 So. 2d 938, 939 (Fla. 4th Dist. Ct. App. 1991) (finding that substituted service upon wife at estranged husband's home when she did not reside there was invalid).

44. *Berne v. Beznos*, 819 So. 2d 235, 239 (Fla. 3d Dist. Ct. App. 2002) (holding that as concierge of apartment building was not a person who resided at the apartment building, concierge was unauthorized to receive service of process for defendant and service of process should have been quashed).

45. See *Thomas v. Silvers*, 748 So. 2d 263, 263 (Fla. 1999).

46. FLA. R. CIV. P. 1.070(j).

47. *Id.*

48. *Id.*

49. *Id.*

50. See *Montero*, 581 So. 2d at 939.

51. § 48.031(2)(a).

This distinction between these rule violations is crucial. As such, the Florida District Courts of Appeal are weary of entertaining all interlocutory appeals and must distinguish between them as the Supreme Court of Florida did in *Thomas*.⁵² Yet, in order to understand the context in which these interlocutory appeals occur, it is necessary to further expand upon appellate jurisdiction in Florida.

III. THE APPELLATE SYSTEM IN FLORIDA

Florida created a two-tier appellate system in 1956.⁵³ Previous to this amendment to the Florida Constitution, only the Supreme Court of Florida conducted appellate review of trial court cases.⁵⁴ The need for additional courts arose because the workload of the court system in Florida became unmanageable.⁵⁵ Additionally, commentators have suggested that appellate courts in Florida, as well as in other states, came into existence partially to correct "routine error."⁵⁶ With the more rudimentary tasks apportioned to these mid-level courts, the highest court in the state can concentrate on more important and urgent legal issues.⁵⁷ However, even today a significant consideration in constructing effective judicial administration is creating a system that effectively and efficiently apportions workloads.⁵⁸

Thus, an ideal goal of judicial administration is crafting a framework in which justice is done and the justices maintain manageable dockets. Two of the methods employed to achieve this goal are limiting what issues are appealable and limiting when they are appealable.⁵⁹ To adequately describe this process, it is necessary to explore the definition of appellate jurisdiction.

"Appellate jurisdiction is the power to take cognizance of and review proceedings in an inferior court."⁶⁰ In Florida, state appellate court jurisdiction is statutorily proscribed.⁶¹ Jurisdiction of the district courts of appeal

52. See generally *Thomas v. Silvers*, 748 So. 2d 263 (Fla. 1999).

53. FLA. CONST. art. V, §§ 4, 5 (1957).

54. Gerald B. Cope, Jr., *Discretionary Review of the Decisions of Intermediate Appellate Courts: A Comparison of Florida's System with Those of the Other States and the Federal System*, 45 FLA. L. REV. 21, 62 (1993).

55. See FLA. CONST. art. V, §§ 16A-B (1955) (providing for additional county judges for expanding county populations).

56. Cope, *supra* note 54, at 33.

57. *Id.*

58. *Id.* at 77 (discussing Florida's appellate practice of issuing affirmances without a written opinion as necessary to manage the workload).

59. See FLA. R. APP. P. 9.130.

60. *Williams v. State ex rel. Nuccio*, 122 So. 523, 524 (Fla. 1929).

61. See FLA. R. APP. P. 9.030(b).

typically only becomes operative once a final judgment on the merits of the case is entered.⁶² In other words, even if a litigant believes that the trial court has committed an error in ruling on a particular motion or other proceeding, the ruling is typically not directly appealable until judgment has been entered.⁶³ Simply put: litigants will have to wait to appeal until “all judicial labor in the case has come to an end.”⁶⁴

This situation often subjects litigants to unnecessary expenditures of time and money because they may be involved in proceedings that they should not have been compelled to participate in at all. However, relief is available from this apparent inequity. Specifically, the judicial mechanisms of the writ of certiorari and the interlocutory appeal exist for litigants to gain relief from such adverse rulings, even before a final judgment on the merits has been entered.

IV. APPELLATE RELIEF PRIOR TO FINAL JUDGMENT

A. *An Overview*

The Florida district courts of appeal provide mechanisms that allow litigants to appeal adverse rulings before a final judgment on the merits has been entered. Two commonly employed mechanisms for this purpose are the common-law writ of certiorari⁶⁵ and the interlocutory appeal.⁶⁶

A threshold question for any litigant wishing to appeal an adverse ruling at the trial level is where to pursue that appeal. In Florida’s two-tier appellate system, a narrow class of appeals is heard directly by the Supreme Court of Florida.⁶⁷ However, the majority of appeals are heard by the district courts of appeal.⁶⁸

62. FLA. CONST. art.V, § 4(b)(1)-(2); FLA. R. APP. P. 9.030(b)(1).

63. FLA. CONST. art.V, § 4(b)(1)-(2); FLA. R. APP. P. 9.030(b)(1). *See also* Mary Piccard Vance & Ann M. Piccard, *Direct Appeal Jurisdiction of Florida’s District Courts of Appeal*, 33 STETSON L. REV. 153, 154–55 (2003).

64. Vance & Piccard, *supra* note 63, at 157; *See also* FLA. R. APP. P. 9.020(h); Howard v. Ziegler, 40 So. 2d 776, 777 (Fla. 1949) (“A judgment is final when it adjudicates the merits of the cause and disposes of the pending action, leaving nothing further to be done but the execution of the judgment.” (citations omitted)).

65. FLA. R. APP. P. 9.030(b)(2).

66. FLA. R. APP. P. 9.030(b)(1)(B).

67. FLA. R. APP. P. 9.030(a) (providing for the jurisdictional scope of the Supreme Court of Florida).

68. *See* FLA. R. APP. P. 9.030(b).

The right to appeal in Florida is not express, but has been constructively inferred from the Florida Constitution.⁶⁹ The original *Florida Rules of Appellate Procedure* provided appellate relief before a final judgment on the merits through the writ of certiorari.⁷⁰ These rules also provided for “[a]ppeals from interlocutory orders . . . relating to . . . jurisdiction over the person” to be “prosecuted in accordance with this rule.”⁷¹ The distinction between the two is significant because the grant of a writ of certiorari is more difficult to obtain than the reversal of an interlocutory order.

B. *The Writ of Certiorari*

The classic procedure used to gain relief before final judgment is entered is the common-law writ of certiorari.⁷² A writ of certiorari is “[a]n extraordinary writ issued by an appellate court, at its discretion, directing a lower court to deliver the record in the case for review.”⁷³ However, these writs are rarely granted.⁷⁴

Writs of certiorari are seldom granted because the burden of proof borne by the litigant seeking this extraordinary relief is high.⁷⁵ Specifically, appellate courts will grant the writ only when: “(1) the trial court departed from the essential requirements of the law; (2) the departure resulted in material injury that will affect the remainder of the proceedings below; and (3) the departure cannot be corrected through any other means.”⁷⁶ Thus, unless a litigant meets this heavy burden, the litigant will have to wait until the conclusion of the trial and directly appeal the adverse ruling. By that time, the damage may have already been done.

This situation creates unfairness to litigants because by being forced to continue the trial, they are subjected to unnecessary cost and inconvenience.⁷⁷ This cost and inconvenience is unnecessary because had the ruling been directly appealable, the appellate court could have stepped in and cor-

69. Hala A. Sandridge, *Decisions, Decisions: How the Initial Choice of a State or Federal Forum May Limit Appellate Remedies*, 33 STETSON L. REV. 125, 126–27 (2003).

70. FLA. R. APP. P. 4.5(a)(1), (c) (1957).

71. FLA. R. APP. P. 4.2(a) (1957).

72. Tracy E. Leduc, *Certiorari in the Florida District Courts of Appeal*, 33 STETSON L. REV. 107, 108 (2003).

73. BLACK'S LAW DICTIONARY 220 (7th ed. 1999).

74. Leduc, *supra* note 72, at 108. Leduc suggests interdependency between certiorari and rule 9.130 in that they “expand and contract as changes in the law occur.” *Id.* at 124.

75. *See id.* at 108.

76. *Id.*

77. *Martin-Johnson, Inc. v. Savage*, 509 So. 2d 1097, 1099 (Fla. 1987); *Allstate Ins. Co. v. Langston*, 655 So. 2d 91, 94 (Fla. 1995).

rected the error, if any, and the trial could have then proceeded properly.⁷⁸ Yet judicial economy outweighed these apparent inequities.⁷⁹ This overburdening of the district courts of appeal compelled the Supreme Court of Florida to amend the *Rules of Appellate Procedure* in 1977 to narrow the scope of appealable issues through interlocutory orders.⁸⁰ Still, the easier route to correct error, that is, if your class of appeal is statutorily proscribed, is the interlocutory appeal.

C. *Interlocutory Appeals*

Rule 9.130 of the *Florida Rules of Appellate Procedure* governs “non-final orders.”⁸¹ Appeals of non-final orders are more commonly known as interlocutory appeals. Interlocutory appeals perhaps neatly fall into the category of judicial work, which is properly categorized as routine because they often correct simple trial court errors.⁸²

Yet as much as every litigant would desire an immediate remedy for perceived errors at trial, the district courts of appeal would be overburdened if they were called upon to verify every questionable ruling.⁸³ Additionally, if the appellate jurisdictional scope of interlocutory appeals was extended to every minute issue, speedy determinations of trials would perhaps become non-existent.⁸⁴ Thus, the district courts of appeal in Florida command limited jurisdiction over non-final orders.⁸⁵

Unless the nature of the non-final order falls within the statutorily proscribed categories, the district courts of appeal lack jurisdiction to hear the

78. See *Travelers Ins. Co. v. Bruns*, 443 So. 2d 959, 960–61 (Fla. 1984).

79. *Id.* (noting the 1977 amendment was intended to preserve judicial resources).

80. See Amends. to the Fla. R. of App. P., 696 So. 2d 1103, 1127 (Fla. 1996). The following committee notes discuss the amended rule:

1977 Amendment. This rule replaces former rule 4.2 and substantially alters current practice. This rule applies to review of all non-final orders, except those entered in criminal cases, and those specifically governed by rules 9.100 and 9.110.

The advisory committee was aware that the common law writ of certiorari is available at any time and did not intend to abolish that writ. However, because that writ provides a remedy only if the petitioner meets the heavy burden of showing that a clear departure from the essential requirements of law has resulted in otherwise irreparable harm, it is extremely rare that erroneous interlocutory rulings can be corrected by resort to common law certiorari. It is anticipated that because the most urgent interlocutory orders are appealable under this rule, there will be very few cases in which common law certiorari will provide relief.

Id.

81. FLA. R. APP. P. 9.130.

82. See Cope, *supra* note 54.

83. *Bruns*, 443 So. 2d at 961.

84. See *id.*

85. FLA. R. APP. P. 9.030(b)(1)(B).

appeal.⁸⁶ In Florida's civil courts,⁸⁷ the district courts of appeal have jurisdiction pursuant to rule 9.130 over interlocutory appeals that:

- (A) concern venue;
- (B) grant, continue, modify, deny, or dissolve injunctions, or refuse to modify or dissolve injunctions;
- (C) determine
 - (i) the jurisdiction of the person;
 - (ii) the right to immediate possession of property;
 - (iii) the right to immediate monetary relief or child custody in family law matters;
 - (iv) the entitlement of a party to arbitration;
 - (v) that, as a matter of law, a party is not entitled to workers' compensation immunity;
 - (vi) that a class should be certified; or
 - (vii) that, as a matter of law, a party is not entitled to absolute or qualified immunity in a civil rights claim arising under federal law;
- (D) grant or deny the appointment of a receiver, and terminate or refuse to terminate a receivership.⁸⁸

A fair characterization of rule 9.130 is that the nature of these rulings goes to the initial quality of the proceedings. If this initial and essential quality is erroneously determined at the outset of the proceedings, then judicial resources will be wasted correcting errors and litigants may be substantially inconvenienced.⁸⁹

86. *See id.*

87. FLA. R. APP. P. 9.130(a)(2). "Appeals of non-final orders in criminal cases shall be as prescribed by rule 9.140." *Id.*

88. FLA. R. APP. P. 9.130(3).

89. FLA. R. APP. P. 9.130 Committee Notes (stating "the purpose of these items is to eliminate useless labor").

For example, venue determines where litigation will occur.⁹⁰ As a practical matter, erroneous determinations of venue may cause significant inconvenience to the adversely affected party.⁹¹ Thus, such rulings are immediately appealable pursuant to rule 9.130(a)(3)(A) because if a litigant is forced to wait until the conclusion of the trial to appeal this order, then the relief sought would be moot. The trial has already occurred, and the adversely affected litigant has already sustained the damage caused by the inconvenient venue.

Likewise, orders that determine jurisdiction of the person are subject to interlocutory appeals.⁹² Without the interlocutory mechanism for relief, a party who was not originally subject to personal jurisdiction of the court would have to wait until the trial was concluded to seek relief. However, the issue of what constitutes an order that determines "jurisdiction of the person" is not expressly stated in rule 9.130.⁹³

The classic elements of personal jurisdiction, such as minimum contacts⁹⁴ and notice,⁹⁵ are certainly within this rule's scope. Yet in Florida, there is a time limit on serving a potential party.⁹⁶ A violation of this proscribed time limit typically results in a dismissal of the claim without prejudice.⁹⁷ Thus, there arises the issue of whether a violation of the proscribed time limit for service of process constitutes a question involving "jurisdiction of the person."⁹⁸ To provide a potential answer to this question, it is necessary to show how a particular decision on one of the rules involved, rule 1.070(j),⁹⁹ can have a ripple effect on the focus of this inquiry. Having set the legal framework in which this controversy arises, this paper will now

90. FLA. R. APP. P. 9.130(a)(3)(A). See also *Bus. Aide Computers, Inc. v. Cent. Fla. Mack Trucks, Inc.*, 432 So. 2d 681, 682 (Fla. 5th Dist. Ct. App. 1983) (allowing for interlocutory appeal on the issue of venue pursuant to rule 9.130(a)(3)(A)).

91. See generally *Kinney Sys. Inc. v. Cont'l Ins. Co.*, 674 So. 2d 86 (Fla. 1996) (discussing Florida's doctrine of forum non conveniens).

92. FLA. R. APP. P. 9.130(a)(3)(C)(i).

93. *Id.*

94. *Wartski v. Sencer*, 615 So. 2d 794, 795 (Fla. 5th Dist. Ct. App. 1993) (holding an order denying a motion to dismiss for lack of personal jurisdiction under Florida's long-arm statute and minimum contacts is appealable pursuant to rule 9.130(a)(3)(C)(i)).

95. *Allan v. Hill*, 502 So. 2d 7, 8 (Fla. 4th Dist. Ct. App. 1986) (holding the appellate court had jurisdiction to hear the interlocutory appeal pursuant to rule 9.130(a)(3)(C)(i) because "the [trial] court in effect ruled against Allan's claims of immunity from service of process and improper service of process").

96. FLA. R. CIV. P. 1.070(j).

97. *Id.* (directing the trial court to dismiss the action "without prejudice" for violations).

98. FLA. R. APP. P. 9.130(a)(3)(C)(i).

99. FLA. R. CIV. P. 1.070(j).

proceed to discuss the case law relevant to interlocutory appeals based on claims of untimely service of process.

V. THE CAUSE OF THE CONTROVERSY

A. Morales v. Sperry Rand Corp.

In *Morales v. Sperry Rand Corp.*,¹⁰⁰ the Supreme Court of Florida considered “the consequences of failing to obtain service of process within 120 days of the filing of a complaint as required by *Florida Rule of Civil Procedure* 1.070(j) when no good cause for this failure is demonstrated.”¹⁰¹ In *Morales*, the plaintiff served Sperry’s resident agent four days after the 120-day allowance for service had expired.¹⁰² The circuit court dismissed the complaint based on the plaintiff’s failure to serve process within 120 days of filing the complaint.¹⁰³ The Fourth District Court of Appeal affirmed.¹⁰⁴

On review, the Supreme Court of Florida affirmed the dismissal because the plaintiff had failed to “meet the burden of demonstrating diligence and good cause”¹⁰⁵ to justify the lateness of the service.¹⁰⁶ This court also noted that the trial court had “broad discretion in declining to dismiss an action if reasonable cause for the failure to effect timely service is documented.”¹⁰⁷ Specifically, this court opined that absent this showing of good cause, permitting any untimely service to be valid “would for practical purposes, negate rule 1.070(j) and the reason for its existence.”¹⁰⁸ The policy

100. 601 So. 2d 538 (Fla. 1992).

101. *Id.* at 538.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Morales*, 601 So. 2d at 539.

106. *Id.* at 539 (noting that a comparison with federal rule 4(m) is applicable as the Florida rule is modeled on the federal rule); see also *United States v. Ayer*, 857 F.2d 881, 885 (1st Cir. 1988) (holding that the corresponding federal rule’s mandates may be relaxed after “scrutinizing plaintiff’s efforts” in affecting service); *Lovelace v. Acme Mkts., Inc.*, 820 F.2d 81, 84 (3d Cir. 1987) (holding that the corresponding federal rule for service must be “strictly applied” in the absence of a show of “good cause for the delay” from the plaintiff), *cert. denied*, 484 U.S. 965 (1987). See *contra* *Tevdorachvili v. Chase Manhattan Bank*, 103 F. Supp. 2d 632, 639 n.5 (E.D.N.Y. 2000) (noting that the 1993 amendments to rule 4(m) broadens the trial judge’s discretion and allows district courts to “grant relief from rule 4(m), even in the absence of good cause shown”).

107. *Morales*, 601 So. 2d at 540.

108. *Id.*

underpinning the rule is to demand “diligent prosecution of lawsuits once a complaint is filed.”¹⁰⁹

Thus, this ruling would provide incentive for plaintiffs to comply with the mandates of rule 1.070 of the *Florida Rules of Civil Procedure*. Yet this ruling would have consequences in other, perhaps unforeseen, areas as well. Specifically, this ruling would affect a later decision on the scope of appellate jurisdiction in Florida.

B. *The Root of Conflict: Comisky on Morales*

In *Comisky v. Rosen Management Service, Inc.*,¹¹⁰ the Fourth District Court of Appeal considered en banc¹¹¹ the question of whether denials of motions to quash service based on claims that service was untimely constitute appealable orders.¹¹² Specifically, the issue addressed was whether untimely service pursuant to rule 1.070(i) of the *Florida Rules of Civil Procedure* falls within the parameters of “an ‘order determining jurisdiction of the person’” of rule 9.130(a)(3)(C)(i) of the *Florida Rules of Appellate Procedure*.¹¹³ The 5-4 majority in *Comisky* relied heavily on *Morales*¹¹⁴ and its strict interpretation of rule 1.070(i) of the *Florida Rules of Civil Procedure*.¹¹⁵ The *Comisky* majority held that orders denying motions to quash service based on claims of untimely service are subject to interlocutory appeal.¹¹⁶

In *Comisky*, a third-party defendant was served with process outside the 120-day provision of rule 1.070(i) of the *Florida Rules of Civil Procedure*.¹¹⁷ Additionally, the original defendant in the action provided no good cause for this delay.¹¹⁸ In writing the Fourth District’s majority opinion, Judge Warner acknowledged that this decision “depart[s] from all prior precedent.”¹¹⁹ Yet,

109. *Id.*

110. 630 So. 2d 628 (Fla. 4th Dist. Ct. App. 1994) (en banc) (Polen, J., dissenting), *rev’d per curiam*, 748 So. 2d 263 (Fla. 1999).

111. See FLA. R. APP. P. 9.331(a) (providing for the determination of issues which threaten the court system’s “uniformity” or are of “exceptional importance”). En banc proceedings are decided by a majority of the judges, whereas appeals are generally decided by a panel of three judges. *Id.*

112. *Comisky*, 630 So. 2d at 629.

113. *Id.*

114. *Id.* at 629–30.

115. *Id.*

116. *Id.* at 630.

117. *Comisky*, 630 So. 2d at 630.

118. *Id.*

119. *Id.* at 629. See generally *Khandjian v. Compagnie Financiere Mediterranee Cofimed, S.A.*, 619 So. 2d 348 (Fla. 2d Dist. Ct. App. 1993); *DCA of Hialeah, Inc. v. Lago Grande One*

he reasoned that *Morales*, which was decided in 1992, authorized this change because untimely service of process without good cause was adequate to warrant dismissal of the party.¹²⁰ Additionally, Judge Warner opined that

failure to serve process within the 120 day time limit goes to the sufficiency of the service of process, and thus the validity of the process to subject the defendant to the jurisdiction of the court, an order denying a motion to dismiss on those grounds determines the jurisdiction of the person and is appealable.¹²¹

Thus, Judge Warner believed that the time provision of the limit provided by rule 1.070(j) was essential to perfecting service of process because the rule went to its “validity.”¹²²

Additionally, Judge Warner based part of the opinion on the fact that rule 1.070(j) mirrors its corresponding rule 4(j) of the *Federal Rules of Civil Procedure*.¹²³ Thus, it should follow that a survey of federal rulings on this issue is applicable as the Supreme Court of Florida performed in *Morales*.¹²⁴ Indeed, federal case law¹²⁵ was construed to support the *Comisky* majority position that timeliness of process was an essential element of jurisdiction of the person.¹²⁶

In his dissent, Judge Polen surveyed Florida precedent on this issue and concluded: “to construe *Morales* otherwise, without an amendment to rule 9.130 or a decision by the supreme court, would be wholly improper.”¹²⁷ Additionally, his dissent recognized the distinction between “validity of the service of process itself . . . [and] not merely the timeliness thereof.”¹²⁸ Finally, Judge Polen argues that to hold that timeliness of service does not constitute jurisdiction of the person and is not, therefore, subject to appellate

Condo. Ass’n, Inc., 559 So. 2d 1178 (Fla. 3d Dist. Ct. App. 1990); *Cole v. Posada*, 555 So. 2d 367 (Fla. 3d Dist. Ct. App. 1989).

120. *Comisky*, 630 So. 2d 628, 630 (Fla. 4th Dist. Ct. App. 1994). “*Morales* is on point and requires the dismissal of the complaint as to this appellant.” *Id.*

121. *Id.*

122. *Id.* at 629.

123. *Id.*

124. *See Comisky*, 630 So. 2d at 629; *see also Morales v. Sperry Rand Corp.*, 601 So. 2d 538, 539 (Fla. 1992).

125. *McDonald v. United States*, 898 F.2d 466, 468 (5th Cir. 1990) (holding that defective service outside the 120-day period proscribed by rule 4(j) is insufficient to obtain personal jurisdiction).

126. *Comisky*, 629 So. 2d at 629–30.

127. *Id.* at 631.

128. *Id.*

jurisdiction, would leave the litigant with a remedy because relief could be “obtain[ed] through a petition for common law certiorari.”¹²⁹

Ultimately, the essence of Judge Polen’s dissent became part of the Supreme Court of Florida’s decision in *Thomas*.¹³⁰ However, at least for the time being, Judge Polen’s opinion would not solve this issue. Nonetheless, the ripple caused by *Morales* was now being felt in other areas: appellate jurisdiction over interlocutory appeals.

C. *The Build-Up to Thomas*

The issue of what constitutes the parameters of “jurisdiction of the person” pursuant to rule 9.130 was and would continue to be controversial for some time.¹³¹ In 1994, the Third District Court of Appeal held in *Polo v. Polo*¹³² that timeliness of service was not an element of personal jurisdiction for purposes of interlocutory appeal.¹³³ This decision was consistent with the Third District’s decision the previous year in *RD & G Leasing, Inc. v. Stebnicki*.¹³⁴ Yet in 1994, the Fourth and the Fifth District Courts of Appeal arrived at precisely the opposite result.¹³⁵

As has already been explored in detail, the *Comisky* court in the Fourth District held that timeliness of service of process was an element of “jurisdiction of the person”¹³⁶ pursuant to rule 9.130 and is, therefore, appealable.¹³⁷ Likewise, in *Mid-Florida Associates, Ltd. v. Taylor*,¹³⁸ the Fifth District based its jurisdiction to hear the appeal of untimely service of process upon the *Comisky* court’s precedent.¹³⁹ In *Taylor*, the written opinion does not directly address the jurisdictional issue raised by the opposing statutory interpretations of the Second and Third Districts.¹⁴⁰ Instead, the *Taylor* court claims jurisdiction in a footnote, cites to two cases in favor and two cases

129. *Id.* at 631–32.

130. *See generally* *Thomas v. Silvers*, 748 So. 2d 263 (Fla. 1999).

131. FLA. R. APP. P. 9.130(a)(3)(C)(i).

132. 643 So. 2d 55 (Fla. 3d Dist. Ct. App. 1994).

133. *Id.* at 56; *see also* Anthony C. Musto, *Appellate Practice*, 20 NOVA L. REV. 1, 14 (1995).

134. 626 So. 2d 1002 (Fla. 3d Dist. Ct. App. 1993).

135. *Id.* at 1003; *see also* Anthony C. Musto, *Appellate Practice*, 21 NOVA L. REV. 13, 24 (1996).

136. FLA. R. APP. P. 9.130(a)(3)(C)(i).

137. *See generally* *Comisky v. Rosen Mgmt. Serv., Inc.*, 630 So. 2d 628 (Fla. 4th Dist. Ct. App. 1994) (en banc) (Polen, J., dissenting), *rev’d per curiam*, 748 So. 2d 263 (Fla. 1999).

138. 641 So. 2d 182 (Fla. 5th Dist. Ct. App. 1994).

139. *See id.*

140. *Id.* at n.1.

against the jurisdictional issue, and essentially avoids the controversy.¹⁴¹ In 1995, the Second District Court of Appeal, in *Nowry v. Collyar*,¹⁴² dismissed an appeal of an order denying a motion to dismiss based on claims for untimely service.¹⁴³ The Second District recognized the conflict of its decision with the other circuits.¹⁴⁴ Accordingly, the Second District certified the following question to the Supreme Court of Florida:

DOES AN ORDER DENYING A MOTION TO DISMISS A COMPLAINT CLAIMING UNTIMELY SERVICE PURSUANT TO FLORIDA RULE OF CIVIL PROCEDURE 1.070(i) FAIL TO CONSTITUTE AN ORDER DETERMINING THE JURISDICTION OVER THE PERSON, THUS MAKING IT A NONAPPEALABLE, NON-FINAL ORDER?¹⁴⁵

Yet at that time, the question was not destined to gain an audience with the Supreme Court of Florida.¹⁴⁶ Finally, in *Novella Land, Inc. v. Panama City Beach Office Park, Ltd.*,¹⁴⁷ the First District Court of Appeal recognized this conflict, as well.¹⁴⁸ The court in *Novella* agreed with the Second and Third Districts, and held “an order which denies a motion to dismiss for failure to timely serve a defendant is not an appealable non-final order.”¹⁴⁹

However, the court dismissed the certified question in *Nowry* pursuant to rule 9.350(b) of the *Florida Rules of Appellate Procedure*.¹⁵⁰ Thus, for the moment, the conflict concerning the definition of jurisdiction of the person was unresolved.

D. *The Nowry Inquiry Revived*

Finally, in 1997, a dispute arose in which the Supreme Court of Florida was afforded the opportunity to resolve whether claims of timeliness of service constitute questions of personal jurisdiction pursuant to rule 9.130 of the *Florida Rules of Appellate Procedure*.¹⁵¹ In *Thomas v. Silvers*,¹⁵² the Third

141. *Id.*

142. 666 So. 2d 555 (Fla. 2d Dist. Ct. App. 1995).

143. *Id.* at 556.

144. *Id.*

145. *Id.*

146. *Nowry v. Collyar*, 670 So. 2d 939 (Fla. 1996) (table decision).

147. 662 So. 2d 743 (Fla. 1st Dist. Ct. App. 1995).

148. *Id.* at 743.

149. *Id.* at 744.

150. *Nowry*, 670 So. 2d at 939.

151. *Thomas v. Silvers*, 701 So. 2d 389 (Fla. 3d Dist. Ct. App. 1997), *aff'd* 748 So. 2d 263 (Fla. 1999).

District Court of Appeal granted the appellee's motion to dismiss an appeal for claims of untimely service as defined by rule 1.070(i) of the *Florida Rules of Civil Procedure*.¹⁵³ In a per curiam opinion, the court based its decision on a mixture of statutory interpretation of rule 9.130(a)(3)(C)(i)¹⁵⁴ of the *Florida Rules of Appellate Procedure* and on Third District precedent.¹⁵⁵

The court concluded that untimely service does not fall within the parameters of "jurisdiction of the person" pursuant to rule 9.130(a)(3)(C)(1).¹⁵⁶ Thus, interlocutory orders claiming untimely service are unappealable for lack of appellate jurisdiction.¹⁵⁷ In doing so, the Third District also certified conflict with the Fourth and the Fifth Districts.¹⁵⁸ The question originally certified by the *Nowry* court would soon be resolved.¹⁵⁹

VI. MAKING THE RIPPLE PLACID

A. Thomas v. Silvers

On October 21, 1999, the Supreme Court of Florida resolved this long-standing issue.¹⁶⁰ In *Thomas v. Silvers*,¹⁶¹ the Supreme Court of Florida held that appeals of orders denying motions to quash service based solely on claims that service was untimely pursuant to rule 1.070(i) of the *Florida Rules of Civil Procedure* fall outside the judicially proscribed scope of personal jurisdiction as provided by rule 9.130(a)(3)(C)(i) of the *Florida Rules of Appellate Procedure*.¹⁶² In a per curiam opinion, the Supreme Court of Florida recognized the difficulty presented to appellate courts by litigants continuously seeking review in the district courts for interlocutory appeals.¹⁶³ Specifically, the district courts were forced to review these appeals "piecemeal."¹⁶⁴ By their very nature, interlocutory appeals typically occur during a

152. *Id.*

153. FLA. R. CIV. P. 1.070(i); *Thomas*, 701 So. 2d at 390.

154. FLA. R. APP. P. 9.130(a)(3)(C)(i).

155. *Thomas*, 701 So. 2d at 390.

156. *Id.*

157. *Id.*

158. *Id.*

159. *See Nowry*, 666 So. 2d at 556.

160. *See* FLA. CONST. art. V, § 3(b)(4). The Supreme Court of Florida is authorized to, in its discretion, "review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance, or that is certified by it to be in direct conflict with a decision of another district court of appeal." *Id.*

161. 748 So. 2d 263 (Fla. 1999).

162. *Id.* at 265.

163. *Id.* at 264.

164. *Id.*

trial, allowing such review, in most cases, only “serves to waste court resources and needlessly delay final judgment.”¹⁶⁵ Thus, the court based its opinion on the public policy grounds previously articulated in *Travelers Insurance Co. v. Bruns*.¹⁶⁶ However, the manner in which this court arrived at this ultimate conclusion involves substantial creativity and deserves further explanation.

The dilemma faced by the Supreme Court of Florida in *Bruns* was how to manage and limit the crushing workload faced by the district courts while simultaneously providing efficient and equitable relief from erroneous trial court rulings.¹⁶⁷ In crafting a solution to this problem, this court utilized its inherent power afforded by the Florida Constitution in two ways.¹⁶⁸

First, the court utilized its ability to resolve conflict.¹⁶⁹ This power is afforded to the Supreme Court of Florida by the Florida Constitution.¹⁷⁰ This court could have merely held that denials of motions to quash service based on claims of untimely service do not constitute jurisdiction of the person pursuant to rule 9.130 of the *Florida Rules of Appellate Procedure*, and stopped there.¹⁷¹ However, taken alone, such a holding might unfairly prejudice defendants because they would have no redress until a final judgment had been entered. In this light, such a ruling could be construed as unduly plaintiff friendly. Instead, the Supreme Court of Florida went a step further.¹⁷²

Second, as the Supreme Court of Florida is authorized to promulgate its own court rules,¹⁷³ the opinion noted a recent amendment to the *Florida Rules of Civil Procedure*.¹⁷⁴ The practical effect of this amendment is to augment the discretion of trial judges and encourage them to dismiss parties who have been improperly served.¹⁷⁵ Thus, defendants should be dismissed for untimely service more frequently, and never have to appeal the decision

165. *Id.* (citing *Travelers Ins. Co. v. Bruns*, 443 So. 2d 959, 960–61 (Fla. 1984)).

166. *Thomas*, 748 So. 2d at 264; see *Bruns*, 443 So. 2d at 960–61.

167. See *Bruns*, 443 So. 2d at 960–61.

168. *Id.*

169. FLA. CONST. art. V, § 3(b)(4).

170. *Id.*; see also FLA. R. APP. P. 9.125(a) (providing for direct appeals of trial court rulings by the District Courts of Appeal to the Supreme Court of Florida for questions either having “great public importance or hav[ing] a great effect on the proper administration of justice throughout the state”).

171. See FLA. R. APP. P. 9.130.

172. See *Bruns*, 443 So. 2d at 960–61.

173. FLA. CONST. art. V, § 2(a) (authorizing the Supreme Court of Florida to write court rules).

174. *Thomas v. Silvers*, 748 So. 2d 263, 264 (Fla. 1999).

175. *Id.*

at all.¹⁷⁶ The history and policy underlying this amended rule deserve further discussion.

B. *Amendment to Rule 1.070(j)*

Eleven months before *Thomas* was decided by the Supreme Court of Florida, the court published *Amendment to the Florida Rules of Civil Procedure 1.070 (j) Time Limit for Service*.¹⁷⁷ In this proposal, the Supreme Court of Florida relaxed the harshness of the current rule's mandate which "sometimes acts as a severe sanction."¹⁷⁸ This sanction was severe because "even if dismissal under the rule is without prejudice, a plaintiff would be unable to refile suit in cases where the statute of limitations had expired."¹⁷⁹ The new rule would allow "a court broad discretion to extend the time for service even when good cause has not been shown."¹⁸⁰ This change is crucial because defendants can use claims of untimely service to evade entirely the courts' jurisdiction.

Seven months before *Thomas* was decided by the Supreme Court of Florida, the court amended the *Florida Rules of Civil Procedure*. On March 4, 1999, the Supreme Court of Florida published *Amendment to Florida Rule of Civil Procedure 1.070(j) Time Limit for Service*.¹⁸¹ This adopted amendment provided:

(j) Summons; Time Limit. If service of the initial process and initial pleading is not made upon a defendant within 120 days after filing of the initial pleading . . . the court, on its own initiative after notice or on motion, shall direct that service be effected within a specified time or shall dismiss the action . . . without prejudice or drop that defendant . . . as a party . . . provided that if the plaintiff shows good cause or excusable neglect for the failure, the court shall extend the time for service for an appropriate period. A dismissal under this subdivision shall not be considered a voluntary

176. *Id.* at 264–65.

177. 720 So. 2d 505 (Fla. 1998). This proposed amendment was published in the *Florida Bar News*. *Id.* at 506. The court sought "any comments on the proposed rule within thirty days of the date of publication." *Id.* Specifically, the court asked for input from "the Florida Bar Civil Procedure Rules Committee and interested persons." *Id.*

178. *Id.* at 505.

179. Amend. to Fla. Rule of Civil Proc. 1.070(j) Time Limit for Service, 720 So. 2d 505 (Fla. 1998).

180. *Id.*

181. 746 So. 2d 1084 (Fla. 1999).

dismissal or operate as an adjudication on the merits under rule 1.420(a)(1).¹⁸²

As articulated in the proposal, the practical effect of this amendment is to afford trial judges greater discretion in quashing service of process on improperly served parties.¹⁸³ Yet there are other important considerations.

This paper argues that another policy reason supports the equity of this decision. This policy was articulated after *Thomas* was decided, but was perhaps still an unwritten factor that determined the ultimate outcome of *Thomas*.¹⁸⁴ This reasoning goes to the essence of what personal jurisdiction is and what it is not.

C. *Totura & Co. v. Williams*

On February 17, 2000, the Supreme Court of Florida decided *Totura & Co. v. Williams*.¹⁸⁵ Although the issue in *Williams* centered on Florida's relation-back doctrine,¹⁸⁶ the policies underlying this decision are applicable in the context of timely service of process because both issues center on rule 1.070(j)¹⁸⁷ of the *Florida Rules of Civil Procedure*.

In resolving the conflict of *Williams*, the Supreme Court of Florida held that rule 1.070(j) of the *Florida Rules of Civil Procedure* "is intended to be 'a case management tool, not an additional statute of limitations cutting off liability of a tortfeasor.'"¹⁸⁸ This notion is well supported by rule 1.010 of the *Florida Rules of Civil Procedure*¹⁸⁹ and is substantially buttressed by previous holdings.¹⁹⁰ In this connection, once a case is filed, the statute of limitations is tolled, and allowing a party to escape litigation for failing to serve process in a timely fashion would cause "technical defenses [to] be-

182. *Id.*

183. *Thomas*, 748 So. 2d at 264.

184. *See generally id.* at 263.

185. 754 So. 2d 671 (Fla. 2000).

186. *Id.* at 672.

187. FLA. R. CIV. P. 1.070(j).

188. *Williams*, 754 So. 2d at 678 (quoting *Root v. Little*, 721 So. 2d 836, 837 (Fla. 5th Dist. Ct. App. 1998)).

189. FLA. R. CIV. P. 1.010 ("These rules shall be construed to secure the just, speedy, and inexpensive determination of every action.").

190. *See Kozel v. Ostendorf*, 629 So. 2d 817, 818 (Fla. 1993) (identifying the purpose as "encourag[ing] the orderly movement of litigation"); *Mercer v. Raine*, 443 So. 2d 944, 946 (Fla. 1983) ("The purpose of the rules of civil procedure is to promote the orderly movement of litigation."); *Amlan, Inc. v. Detroit Diesel Corp.*, 651 So. 2d 701, 704-05 (Fla. 4th Dist. Ct. App. 1995) ("The purpose of the rules of civil procedure is to promote the orderly movement of litigation.") (quoting *Mercer*, 443 So. 2d at 946).

come the centerpiece of the litigation”¹⁹¹ In that situation, “the merits are obscured, if not totally overshadowed.”¹⁹² Thus, if the time limit provided by rule 1.070(j) is a “case management tool,”¹⁹³ then it is not truly an element of personal jurisdiction.

This distinction is precisely why the underlying policy of *Williams* is applicable to *Thomas*. Just because rule 1.070(j) of the *Florida Rules of Civil Procedure* prescribes a time limit to effect valid service of process,¹⁹⁴ it does not mean that failure to comply with the time requirements constitutes a question of jurisdiction of the person. It merely constitutes an issue of judicial administration in the form of case management. This logic was the same erroneous logic employed by *Comisky*:¹⁹⁵ to consider untimely service as invalid may be correct, but to consider untimely service as a jurisdictional question is essentially to mistakenly view a rule designed to be “a case management tool,”¹⁹⁶ as an element of personal jurisdiction. Thus, for the moment, the ripple created by *Comisky* is placid.

VII. CONCLUSION

The decision in *Thomas* was correct and embodies sound judicial policies. Time limits on service do not equate to true legal power. Timeliness of service of process is not a substantive element of personal jurisdiction because it fails to go to the essential quality of service of process: notice.¹⁹⁷ Notice is paramount for a court to have jurisdiction or power over a defendant.¹⁹⁸ The time limit on service of process is merely a procedural aspect designed to efficiently move cases through the courts.¹⁹⁹ Thus, defendants are properly precluded from using technical claims of untimely service of process to evade justice.²⁰⁰ Indeed, as articulated in Judge Polen’s dissent in *Comisky*, a truly unjust result stemming from the issue of timeliness of service of process may be corrected by a common law writ of certiorari.²⁰¹

191. *Williams*, 754 So. 2d at 678.

192. *Id.*

193. *Id.* at 678 (quoting *Root v. Little*, 721 So. 2d 836, 837 (Fla. 5th Dist. Ct. App. 1998)).

194. FLA. R. CIV. P. 1.070(j).

195. See generally *Comisky v. Rosen Mgmt. Serv., Inc.*, 630 So. 2d 628 (Fla. 4th Dist. Ct. App. 1994) (en banc) (Polen, J., dissenting), *rev’d per curiam*, 748 So. 2d 263 (Fla. 1999).

196. See generally *Williams*, 754 So. 2d at 678.

197. See *Bedford Computer Corp. v. Graphic Press, Inc.*, 484 So. 2d 1225, 1227 (Fla. 1986).

198. *Id.*

199. *Williams*, 754 So. 2d at 678.

200. *Id.*

201. *Comisky*, 630 So. 2d at 631–32.

Case management is an important aspect of judicial administration.²⁰² When questions of personal jurisdiction intersect with questions of appellate jurisdiction, the situation can be quite complicated. This is especially true when the judiciary must craft a solution that balances the interests of litigants against the interests of judicial economy.²⁰³ In *Thomas*, the Supreme Court of Florida creatively and equitably solved this issue so that both litigants' rights and the judicial economy are preserved. Indeed, after *Thomas*, plaintiffs' causes of action are better protected and less interlocutory appeals will be entertained. In *Thomas*, the Supreme Court of Florida effectively clarified the essence of personal jurisdiction through the scope of appellate jurisdiction.

202. Cope, *supra* note 54, at 62.

203. *Id.*

TAKING THE “SANDWICH” OFF OF THE MENU: SHOULD FLORIDA DEPART FROM OVER 150 YEARS OF ITS CRIMINAL PROCEDURE AND LET PROSECUTORS HAVE THE LAST WORD?

NICOLE VELASCO*

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I. INTRODUCTION

The gavel bangs. All rise. It begins as any other criminal trial in Florida. The jury sits patiently as the judge informs them of the charges alleged against the Defendant, and then the attorneys sweep the jurors away with their opening arguments. Slowly, the facts begin to unfold. The jury learns that on September 13, 2002, a woman from Lee County, Florida was brutally raped in her own home while her children slept in the next room.¹ When she takes the stand, she tells the jury that the Defendant broke into her home in the dead of night on that September evening.² They listen raptly as she recounts her horrific experience. The Prosecutor, representing the State of

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1. Britt Dys, *Rape Case Sparked the Bill*, FLA. B. NEWS, Apr. 1, 2004, at 10.

2. *Id.*

Florida, corroborates the victim's testimony by presenting DNA evidence which irrefutably links the Defendant to the alleged crime.³

When it is the Defendant's turn to take the stand, the jurors listen to his claims that he formerly dated the victim.⁴ He argues that the sexual intercourse with her was consensual, which is why his DNA was found at the scene.⁵ However, this explanation quickly becomes unsatisfactory when the prosecution calls its rebuttal witness: a police officer who testifies that the time during which the Defendant alleges to have "dated" the victim, the Defendant was in jail.⁶ After the Defendant testifies, his attorney declines to call any more witnesses.⁷

After both sides have presented all of the evidence, the defense makes the first closing argument.⁸ The prosecution follows with its final attempt to remove all reasonable doubt of the Defendant's guilt from the jurors' minds.⁹ The defense gets up once again, this time to rebut the State's argument and impress the final words upon the jury.¹⁰

The jury deliberates for ninety minutes before returning from the jury room.¹¹ All rise again, this time anxiously awaiting the jury's decision as they file into the jury box. The foreman hands the verdict to the bailiff. Silence permeates the courtroom, and then a wave of shock and disbelief washes over its occupants as the clerk announces a verdict of not guilty.¹²

The scene you have just envisioned is not an imaginary one. It is a recap of the true story of Christopher Hiatt's prosecution and subsequent acquittal,¹³ which disgusted one Florida legislator enough to try to change the process of Florida criminal trials.¹⁴ The proposed solution is articulated in

3. *Id.*

4. *Id.*

5. *Id.*

6. *Dys, supra* note 1.

7. *See id.*

8. *See id.*

9. *See id.*

10. *See id.*

11. *Dys, supra* note 1.

12. *Id.*

13. *State v. Hiatt*, No. 02-003394 CF (Fla. 20th Cir. Ct. 2003), at http://www.leeclerk.org/crim_detail.asp?CsNum=02003394CF&CsType=.

14. *Dys, supra* note 1. Representative Carol Green sponsored House Bill 1149. *Id.* In the article, she stated that she "was so upset by what [she] watched happen" in the trial, and that in her opinion, Hiatt lied in his testimony. *Id.* The prosecutor in the *Hiatt* case stated, "It was hideous." *Id.*

House Bill 1149,¹⁵ and has the power to snatch away defendants' present advantage of having the last word in criminal trials.¹⁶

The order of closing arguments in criminal proceedings is currently governed by rule 3.250 of the *Florida Rules of Criminal Procedure*,¹⁷ or, as most Floridian practitioners affectionately call it, the "sandwich rule." This rule states that "a defendant offering no testimony in his or her own behalf, except the defendant's own, shall be entitled to the concluding argument before the jury."¹⁸ As was the case in *State v. Hiatt*,¹⁹ defendants who present nothing more than their own testimony at trial have the distinct advantage of giving the first closing argument and the rebuttal argument at final summation, thereby sandwiching the prosecution's argument in between. The courts of Florida have followed rule 3.250 without question for over 150 years.²⁰ Consequently, for over a century and a half, the order of closing arguments in Florida's criminal trials has hinged upon the defense's trial strategy.

The proposal espoused by House Bill 1149 posed to end that tradition by repealing rule 3.250 and enacting section 918.19 of the *Florida Statutes*.²¹ Although ultimately the bill was not among those signed by the Governor,²² its proposition raises fascinating legal issues. A statute like proposed section 918.19 would entitle the prosecution to the first closing argument and the rebuttal argument in all criminal trials, without giving any effect to the evi-

15. H.R. 1149, Fla. Leg., Reg. Sess. (2004), available at http://www.myfloridahouse.gov/loadDoc.aspx?FileName=_h1149_.doc&DocumentType=Bill&Number=1149&Session=2004 (last visited Oct. 14, 2004).

16. *Id.*

17. FLA. R. CRIM. P. 3.250.

18. *Id.*

19. *Hiatt*, No. 02-003394 CF (Fla. Cir. Ct. 2003), at http://www.leeclerk.org/crim_detail.asp?CsNum=02003394CF&CsType=.

20. Britt Dys & Jan Pudlow, *Who Gets the Last Say? Bill Would Reverse the Order of Closing Arguments*, FLA. B. NEWS, Apr. 1, 2004, at 1. During the hundredth year of the rule's enactment, the Supreme Court of Florida stated, "Never once . . . during the past one hundred years has this court deviated from the proposition that the right given by the statute is a vested procedural right which cannot be denied to a defendant when he is entitled to exercise it." *Faulk v. State*, 104 So. 2d 519, 521 (Fla. 1958).

21. H.R. 1149.

22. H.R. 1149, Fla. Leg., Reg. Sess. (2004), available at http://www.flsenate.gov/session/index.cfm?Mode=Bills&SubMenu=1&Tab=session&BI_Mode=ViewBillInfo&BillNum=1149&Chamber=House&Year=2004&Title=%2D%3EBill%2520Info%3AH%25201149%2D%3E%25202004 (last visited Oct. 14, 2004). The bill died in committee on April 30, 2004, after being introduced to the Florida Senate and referred to the Judiciary and Criminal Justice Committees. H.R. 1149.

dence the defense may or may not present.²³ Thus, if and when the change does pass into law, it will be the defense who perpetually gets “sandwiched.”

The heated debates over whether to enact this new bill²⁴ begs the question: is it the law and the facts upon which jurors base their verdicts, or is it the closing arguments? Does having the last word determine whether justice will be served? This article will explore the answers to these questions, as well as which avenues should be taken to ensure that Florida’s criminal justice system is one about seeking the truth.

Part II of this article discusses the purpose of the closing argument and its impact on the criminal trial. Part III surveys the history of this facet of Florida criminal procedure law, as well as how a change such as that proposed by House Bill 1149 would affect criminal procedure in Florida. Part IV analyzes the laws governing the forty-six other states that have already implemented rules similar to proposed section 918.19 of the *Florida Statutes*, while Part V examines the four states that have declined to follow the proposed Florida rule. Part VI discusses the possible reaction of the Supreme Court of Florida to such a rule. Finally, Part VII will conclude with a recommendation that Florida’s legislators continue to seek the repeal of rule 3.250 to give prosecutors the statutory right to make the final argument in criminal trials.

II. THE POWER OF THE LAST WORD

The power of the last word is one that most of us like to have when we argue, and lawyers in particular have been known to suffer from “the last word disease.”²⁵ This power that lawyers crave usually takes shape in the form of the closing argument, which is one of the most crucial elements of the entire trial presentation.²⁶ In fact, closing arguments are viewed by our criminal justice system as so vital that they are recognized as fundamental to the right to present a defense at trial.²⁷ In 1975, the United States Supreme Court described the importance of the closing argument by stating, “[t]he difference in any case between total denial of final argument and a concise but persuasive summation could spell the difference, for the defendant, be-

23. H.R. 1149

24. Dys & Pudlow, *supra* note 20, at 1.

25. Jason Vail, *To Reply or Not to Reply: When Having the Last Word Doesn’t Cut It*, OR. ST. B. BULL., Dec. 2000, at 33.

26. Tucker Ronzetti & Janet L. Humphreys, *Avoiding Pitfalls in Closing Arguments*, FLA. B.J., Dec. 2003, at 36.

27. Michael R. Flaherty, Annotation, *Propriety of Trial Court Order Limiting Time for Opening or Closing Argument in Criminal Case—State Cases*, 71 A.L.R. 4th 200, 208–09 (1989) (citing *Herring v. New York*, 422 U.S. 853 (1975)).

tween liberty and unjust imprisonment."²⁸ Undoubtedly, most criminal defendants view the quality of their closing arguments as a factor upon which their freedom depends.

The right to assistance of counsel provided by the Sixth Amendment of the United States Constitution,²⁹ along with the Due Process Clause contained within the Fourteenth Amendment,³⁰ have been interpreted by the United States Supreme Court to mean that "there can be no restrictions upon the function of counsel in defending a criminal prosecution."³¹ Indeed, the right to present a closing argument in a criminal trial is one that American courts take very seriously,³² and failure to provide a defendant with the opportunity to exercise that right has been deemed reversible error by the highest court of this country.³³ Even pro se defendants are entitled to present a final summation at the close of evidence,³⁴ regardless of whether the case is tried before a jury.³⁵ This right has also been interpreted by the United States Supreme Court, along with certain state courts, as deriving from the language of the Sixth Amendment.³⁶ It is worth mentioning that although it is not the focus of this discussion, the right to final summation, though widely recognized,³⁷ can, like other substantive rights, be waived.³⁸

Perhaps the magnitude of the closing argument is best understood in light of its purpose. In a criminal trial, the closing argument is a mechanism for sharpening and clarifying the issues upon which the trier of fact must render judgment.³⁹ It reinforces in the jurors' minds, in words and phrases

28. *Herring*, 422 U.S. at 863.

29. U.S. CONST. amend. VI. In relevant part, the Sixth Amendment states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Id.

30. U.S. CONST. amend. XIV.

31. *Herring*, 422 U.S. at 857.

32. See, e.g., *State v. Plaskonka*, 577 A.2d 729, 731 (Conn. App. Ct. 1990) (stating that failure to give a defendant the opportunity to present a closing argument is grounds for a new trial on appeal).

33. *Herring*, 422 U.S. at 865.

34. JACOB A. STEIN, CLOSING ARGUMENT § 3 (1996) (citing *Herring*, 422 U.S. at 864 n. 18; *Holmes v. State*, 637 A.2d 113, 116 (Md. 1994)).

35. *Plaskonka*, 577 A.2d at 731; *Holmes*, 637 A.2d at 116.

36. *Holmes*, 637 A.2d at 116.

37. *Herring*, 422 U.S. at 860.

38. 15 FLA. JUR. 2d *Criminal Law* § 1773 (2001); STEIN, *supra* note 34, § 4.

39. STEIN, *supra* note 34, § 2 (citing *Herring*, 422 U.S. at 862).

that make sense to them, a clear picture of what the evidence has already painted.⁴⁰

The trial is like a jigsaw puzzle. It has a bunch of tiny little pieces of evidence, all coming in at different times—and really meaningless to a jury. And when you put it together in the summation, it becomes a great big painting. A beautiful painting is what you want them to see.⁴¹

Others describe the closing argument as a device through which to organize and highlight favorable evidence, rebut opposing arguments, explain the applicable law, and show the jury that the evidence leads to a verdict in favor of the arguing attorney.⁴² In other words, the goal is “to convince the trier of fact that the advocate’s view of the disputed issues is correct and that it should render a verdict accordingly.”⁴³

According to Texas, a state that has specifically defined the main purpose of arguments to the jury, summations must assist in proper analysis of the evidence so that the jury may reach a “just and reasonable conclusion based on the evidence alone.”⁴⁴ The courts of Texas have also created a specific standard by which jury arguments are measured.⁴⁵ The attorney’s argument must fall into one of four general categories: 1) summation of the evidence; 2) reasonable deduction from the evidence; 3) response to argument made by opposing counsel; or 4) pleas for law enforcement.⁴⁶

It is generally atypical for a court to create such methodological rules with regard to final summation.⁴⁷ During closing arguments, more than at any other point in the trial, an attorney has the opportunity to truly become an advocate for his or her client.⁴⁸ Thus, in the interest of encouraging advocacy, courts generally allow attorneys a wide margin for error⁴⁹ and liberal

40. STEIN, *supra* note 34, § 200.

41. BETTYRUTH WALTER, *THE JURY SUMMATION AS SPEECH GENRE* 40–41 (Jacob L. Mey et al. eds., 1988) (quoting attorney Stanley E. Preiser’s response to the question, “[W]hat is the main thing you are trying to do during the summation?”).

42. J. ALEXANDER TANFORD, *THE TRIAL PROCESS* 133 (Murray L. Schwartz et al. eds., 1983).

43. H. Mitchell Caldwell et al., *The Art and Architecture of Closing Argument*, 76 TUL. L. REV. 961, 969 (2002).

44. *Alex v. State*, 930 S.W.2d 787, 791 (Tex. Ct. App. 1996) (quoting *Dickinson v. State*, 685 S.W.2d 320, 322 (Tex. Crim. App. 1984)).

45. *Alex*, 930 S.W.2d at 791.

46. *Id.* (citing *McKay v. State*, 707 S.W.2d 23, 36 (Tex. Crim. App. 1985)).

47. 75A AM. JUR. 2D *Trial* § 554 (1991).

48. STEIN, *supra* note 34, § 1.

49. *Id.*

freedom of speech⁵⁰ in the presentation of their arguments to the jury.⁵¹ It is generally true, therefore, that the law governing closing arguments is without specific rules and is noticeably less technical than other bodies of law.⁵²

However, not everyone agrees that permitting such freedom for the purposes of promoting advocacy is a good idea.⁵³ One author, when commenting on the negative effects of the adversarial system as it relates to the practice of criminal law, discussed the tactics and behavior some attorneys employ at trial.⁵⁴ The author specifically mentions that the tendency of trial lawyers to "obscure the facts rather than illuminate them"⁵⁵ and to "increase prejudice rather than reduce it,"⁵⁶ is due to the pressure attorneys feel to create stronger cases.⁵⁷ "Each side, after all, is not fighting for the truth to emerge; it is fighting to win."⁵⁸ While presumably not all attorneys operate under this mentality during the normal course of a trial, some do argue to win during closing argument; and those who do not, nonetheless seek to be as persuasive as possible when speaking their final words to the jury.⁵⁹

The significance of being the last to speak is so entrenched in American culture that we associate the "last word" with an advantage to the person who gets it.⁶⁰ Lawyers and judges alike carry this association directly into the legal world⁶¹ with regard to the order of closing arguments in criminal trials.⁶² Judge Walden of the Fourth District Court of Appeal has stated, "[A]s all acquainted with trial tactics know . . . the right to address the jury finally

50. 75A AM. JUR. 2D *Trial* § 554 (1991) (citing *Ga. Power Co. v. Walker*, 114 S.E.2d 159, 161 (Ga. Ct. App. 1960); *State v. Crisp*, 94 S.E.2d 402, 406 (N.C. 1956); *Johnson v. Life Ins. Co. of Ga.*, 88 S.E.2d 260, 269 (S.C. 1955)).

51. STEIN, *supra* note 34, § 1.

52. *Id.*

53. LAWRENCE BAUM, *AMERICAN COURTS: PROCESS AND POLICY* 182 (Mary Dougherty et al. eds., 5th ed. 2001).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. BAUM, *supra* note 53, at 182.

59. WALTER, *supra* note 41, at 41. Dr. Walter conducted extensive studies on jury summation, including its perceived importance in the words of attorneys. *Id.* When asked the question, "What is the main thing you are trying to do during the summation?" the majority (fifteen of the thirty-four attorneys questioned) responded that their goal is to persuade, while only two replied that they attempt to win the case at summation. *Id.* at 40-41.

60. John B. Mitchell, *Why Should the Prosecutor Get the Last Word?*, 27 AM. J. CRIM. L. 139, 145 (2000).

61. *Id.* at 149.

62. See *Wike v. State*, 648 So. 2d 683 (Fla. 1994) (Anstead, J., specially concurring); *Raysor v. State*, 272 So. 2d 867, 869 (Fla. 4th Dist. Ct. App. 1973).

is a fundamental advantage which simply speaks for itself.”⁶³ “Under [our] system, and in reality, it does matter who gets the last opportunity to address the jury.”⁶⁴

The plethora of literature on the subject of how to argue more effectively at final summation⁶⁵ suggests that attorneys believe that closing arguments are powerful enough to persuade a jury to come to their conclusions, even if the law or facts on their sides are slightly lacking.⁶⁶ Indeed, some say that in “close” cases, where neither the law nor the facts appear predominately one-sided, the persuasive talent of the lawyers, which will surface mostly during opening and closing arguments, could possibly be the tie-breaker.⁶⁷ “The closing argument, no matter how strong, will seldom save a botched trial, but where the issues are close and the decision is in doubt, an effective final argument can be the difference between winning and losing.”⁶⁸ Such ideas are undoubtedly based on attorneys’ beliefs that they possess control over the outcomes of the trials in which they argue, and that their skills can positively impact their client’s position.⁶⁹ Studies show, however, that this conception may be more than a belief.⁷⁰

63. *Raysor*, 272 So. 2d at 869.

64. *Wike*, 648 So. 2d at 688.

65. Mitchell, *supra* note 60, at 147 n.16 (listing a sampling of the books that can be found in one’s law library on the subject of closing arguments).

66. See, e.g., Ray E. Moses, *The Last Word*, CHAMPION, Aug. 1997, at 55. The article discusses how to “help jurors make correct choices,” as well as how “to influence those choices by what [we] say during the argument phase of the trial.” *Id.*

67. Caldwell et al., *supra* note 43, at 969.

68. STEIN, *supra* note 34, § 201.

69. Mitchell, *supra* note 60, at 148; WALTER, *supra* note 41, at 38–39. Dr. Walter questioned thirty-four attorneys in her study on jury summation. WALTER, *supra* note 41, at 38–39. When asked, “What is the value of the summation to the trial process,” seventy-six percent responded that it is extremely important:

1. “If a case can still be won or lost at the summation stage, then it is clearly the most important part of the trial.”
S. Gerald Litvin

2. “I regard the trial as only a device to enable you to sum up to a jury.”

A. Charles Peruto

3. “I think it’s probably the single most important factor that determines the guilt or innocence of the defendant. It’s that important.”

“To me the entire trial is a preface to a summation. It’s all leading up to that. The lawyer is gearing the whole trial to that hour he can stand up before the jury and GO! He can do his thing.”
Eugene F. Toro

4. “I think it’s probably the most important part of the trial because it’s the only part of the case that represents pure advocacy. It’s the one time in a trial when almost without restraint a lawyer can stand in front of a group of people and literally argue his case. It’s the most per-

The Department of Psychology at Yale University published a study on opinion changes in individuals, including a section focused specifically on the nature of persuasive communication as it relates to the forming and changing of opinions.⁷¹ The authors made several observations regarding the reactions of audiences to persuasive speeches, one of which appears to be particularly true of juries during closing arguments:⁷²

Shortly after being exposed to one communication, the audience is likely to be exposed to additional communications presenting completely different points of view and designed to create completely different opinions. Hence, the long-run effectiveness of a persuasive communication depends not only upon its success in inducing a momentary shift in opinion but also upon the sustained resistance it can create with respect to subsequent competing pressures.⁷³

suasive part of the case. He tries to explain away some of the calamities and exploit some of the good fortune he's experienced."

"His summation . . . brings to bear on the litigation all of the lawyer's skills: his imagination, his use of language"

"Those of us who defend criminal cases are concerned with that perhaps 20% in the middle where the lawyer's skill can make the difference. And in that category of cases, I think the summation is probably the most influential part of the trial."

Herald Price Fahringer

5. "It's the most important thing I can contribute."

Donald J. Goldberg

6. "I think proper summation can make a difference in a case that's *not* even close."

Raymond A. Brown

7. "From a defense lawyer's standpoint, it's the critical stage of the trial. Particularly in fairly lengthy cases involving complicated factual patterns, where it's not going to be clear to the jury what the case is really about until they hear it summarized and put together and related to one theory or another. I think it's probably, from the defense standpoint, the single most important phase of the trial."

Thomas Colas Carroll

8. "It's priceless—if properly used. Communicating is *the* key point. By communicating you persuade."

John Rogers Carroll

9. "It's of real significant value primarily because you have an opportunity for the first time—and actually for the last—to have direct contact with the jury."

Joseph J. McGill

Id.

70. See generally CARL I. HOVLAND ET AL., COMMUNICATION AND PERSUASION PSYCHOLOGICAL STUDIES OF OPINION CHANGE (1953).

71. *Id.* at 6–11.

72. WALTER, *supra* note 41, at 18 (referring to HOVLAND ET AL., *supra* note 70, at 17).

73. HOVLAND ET AL., *supra* note 70, at 17.

However, no subsequent competition exists for the attorney with the last word in a jury trial, which may explain, at least in part, why the last word is so coveted.

In an ideal criminal justice system, the party with the law and the facts on his or her side would always win,⁷⁴ regardless of who was the last to speak to the jury. In reality, however, there are times when the party with the law and the facts loses at trial.⁷⁵ While such losses are exceptions and may occur for any number of reasons,⁷⁶ some might blame the closing arguments,⁷⁷ probably even more so when they mirror the theatrical, persuasive summations that are so often seen on television.⁷⁸ Along with books and film, television has had a significant impact on society's perception of the legal system.⁷⁹ Consistent with the media's portrayal is the picture of the closing argument as "the great dramatic moment."⁸⁰ Trial attorneys who understand that society expects this kind of drama at trial, perhaps in an attempt to live up to the image, incorporate it intentionally into their closing arguments.⁸¹

Jurors like to be entertained. 'OK, smart, big time, well paid lawyer. Entertain us a little.' And they expect to hear just a tad of oratory. To the extent that we all try to dress well, and not use bad language before them, and try not to show our worst side to them, we are catering to that fact.⁸²

Attorneys have been fixated on the idea that closing arguments affect jury verdicts for at least ninety years.⁸³ In 1912, Yale Law Journal published an article criticizing the new time constraints that the attorneys of that time were beginning to face with regard to closing arguments.⁸⁴ The author blamed the "foolish verdict[s]" that often resulted on the brevity of these

74. Caldwell et al., *supra* note 43, at 969.

75. *Id.*

76. *Id.*

77. Dys, *supra* note 1, at 10. The article quotes Florida Representative Carole Green, who, upon learning of the jury's not-guilty verdict in the *Hiatt* case, stated that the victim "was victimized by what's happened in the court proceedings." *Id.*

78. Mitchell, *supra* note 60, at 149.

79. *Id.* Mr. Mitchell suggests in his article that perhaps this image persuades some lawyers to join the legal profession in the first place. *Id.*

80. *Id.*

81. WALTER, *supra* note 41, at 42.

82. *Id.* (citing the response of a criminal defense attorney when asked, "What is the main thing you are trying to do during the summation?").

83. John I. Williamson, *The Disappearing Argument*, 21 YALE L.J. 489 (1912).

84. *Id.*

arguments,⁸⁵ an accusation which contains an underlying message that closing arguments are crucial to the verdict-rendering process.

But perhaps to the dismay of some trial lawyers, at least one study has revealed that closing arguments are irrelevant to the decision-making process of jurors.⁸⁶ The heads of this study labeled the "crucial importance" with which attorneys regard the last word as merely "another myth lawyers hold dear."⁸⁷ According to the authors of the study, closing arguments do not even factor in to the jury's process of verdict rendition.⁸⁸ Not a single juror, in over 2000 post-verdict interviews, attested to reaching a final decision during or because of closing arguments.⁸⁹ The authors found instead that most jurors make up their minds during the trial itself, based on both testimonial and documentary evidence,⁹⁰ while the rest of them decide during deliberations with their peers in the jury room.⁹¹

In a separate study conducted by Dr. Walter in which 214 jurors were questioned on the importance of the final summation, eighty-eight percent reported that they found the closing arguments to be important.⁹² However, Dr. Walter conducted yet another study using different jurors, which revealed that only six percent of those surveyed felt that the closing speeches of the lawyers were important in reaching their decision in that particular case.⁹³

85. *Id.* at 491.

86. Howard Varinsky & Paulette Taylor, *Trial Myths and Misconceptions*, FOR THE DEFENSE, Nov. 2003, at 26, 56. The authors state that the article was written, after two decades of speaking with jurors and conducting research to better understand jury behavior and decision-making processes, with the goal of naming and dispelling age-old trial myths. *Id.* at 27.

87. *Id.* at 56.

88. *Id.*

89. *Id.* Even for those attorneys who believe that jurors expect to hear closing arguments at trial, this information may not be surprising, as not all attorneys deem closing arguments to be essential to the trial process. See WALTER, *supra* note 41, at 39. "Closing speeches don't make a damn bit of difference. It's part of the show." *Id.* (quoting the response of a criminal defense attorney when asked, "What is the value of the summation to the trial process?").

90. Note that this is entirely inconsistent with the instructions jurors receive which prohibit them from forming decisions about the case until deliberations, when all of the evidence has been presented. FLA. BAR, FLORIDA STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 2.1 (4th ed. 2002). However, as Herbert J. Stern says, "people are never impartial for any longer than they have to be." HERBERT J. STERN, TRYING CASES TO WIN 115, 119 (1991).

91. Varinsky & Taylor, *supra* note 86, at 56.

92. WALTER, *supra* note 41, at 197. According to the study, the number one reason jurors find the summation to be important is because it helps to refresh their memories. *Id.*

93. Mitchell, *supra* note 60, at 152 (referring to WALTER, *supra* note 41, at 205). Dr. Walter mentions in her analysis of these results that the jurors were told, prior to deliberating and filling out the questionnaires, to rely more on the law and the evidence than on the closing

Despite these findings, jurors have been known to ignore irrefutable physical evidence of guilt and acquit defendants who strongly appear to be guilty of violent crimes.⁹⁴ Psychological experts say that the reason for this phenomenon is the use of certain implicit trial tactics by defense attorneys.⁹⁵ If the defense attorney can engage the jurors in “absolutely essential psychological processes and address[s] certain emotional issues” the attorney will successfully sway the jury in his or her direction.⁹⁶ One way that attorneys do this is by creating a strong portrayal of the defendant as “psychologically innocent” and as someone who is just like them.⁹⁷ Or, if such a portrayal is not likely to be convincing, the defense might play upon the jurors’ emotions⁹⁸ by focusing on the defendant’s tearful family.⁹⁹ Often they will paint a picture of the victim as the monster, as long as it is “someone or something else other than the defendant against whom the jury can feel anger and to whom they may apply punishment, so as to lend balance to their decision to grant the perpetrator of a crime absolution, and thereby provide themselves emotional equity.”¹⁰⁰

Although experts attribute the success of attorneys who are able to win this psychological game to clever selection of receptive jurors during voir dire,¹⁰¹ it is not illogical to conclude that closing statements must also be of aid. Arguments are instruments of persuasion,¹⁰² and a key element of persuasion is the recommended conclusion that is presented in the communication.¹⁰³ At closing arguments, the recommended conclusion is that the arguing attorney is correct.¹⁰⁴ During that time, the attorney must “sell” his or her case to the jury.¹⁰⁵ It is likely that sometimes this “sale” helps to convince

arguments of the attorneys. WALTER, *supra* note 41, at 205. In Dr. Walter’s opinion, the resulting data, indicating that only six percent felt closing arguments were important to their decision-making process, was strongly influenced by the jurors not wanting anyone to think that they disobeyed the instructions of the court. *Id.* at 205–06.

94. MARTIN BLINDER, *PSYCHIATRY IN THE EVERYDAY PRACTICE OF LAW* § 9:1(b), at 836 (4th ed. 2003).

95. *Id.*

96. *Id.* § 9:1(b), at 837.

97. *Id.*

98. *Id.* However, it is generally thought to be improper for an attorney to appeal to the sympathies of the jury. 75A AM. JUR. 2D *Trial* § 649 (1991).

99. BLINDER, *supra* note 94, § 9:1(b), at 837.

100. *Id.*

101. *Id.* § 9:1(b), at 839.

102. FRANCIS X. BUSCH, *LAW AND TACTICS IN JURY TRIALS* § 493 (1949).

103. HOVLAND ET AL., *supra* note 70, at 10.

104. Caldwell et al., *supra* note 43, at 969.

105. TANFORD, *supra* note 42, at 133.

jurors to turn their backs on the evidence and focus on the defense attorney's psychologically engaging portrayal of the defendant.¹⁰⁶

The debate about whether jurors base their verdicts on the information they hear at closing arguments, or on information that they receive during the trial, is one of primacy versus recency.¹⁰⁷ Primacy and recency describe trends that lawyers have always intuitively sensed, though perhaps without complete understanding.¹⁰⁸ The term "primacy" refers to the notion that what we hear first is significant, because it induces us to commit to certain positions and lays a foundation for the information that follows.¹⁰⁹ The term "recency" refers to the notion that what we hear last is most memorable, and is therefore easier to recall and has the largest impact on our decisions.¹¹⁰

Whether jurors base any part of their verdicts on the statements made by counsel during closing arguments is a debate that is not likely to cease. However, if it is true that jurors make up their minds during the trial based on the evidence,¹¹¹ then changing rule 3.250 so that it entitles the prosecutor to the first and final closing arguments, without giving any effect to the testimony presented by the defense, would actually benefit the defendant. Without the current version of rule 3.250, the defense would be free to present as much testimony or other evidence as needed, thereby having a presumably significant impact on those jurors who make up their minds during the trial based on the evidence presented to them.¹¹²

Even if, on the other hand, jurors are swayed by the statements attorneys make, and closing arguments do factor into their decisions, a change in rule 3.250 is warranted.¹¹³ Given the susceptibility of jurors to sometimes ignore the evidence before them,¹¹⁴ the arguments in favor of giving the State of Florida the final argument before the jury in all criminal trials are sufficiently compelling, especially when coupled with the fact that the prosecution bears the heavy burden of proof.¹¹⁵

106. BLINDER, *supra* note 94, § 9:1(b), at 837.

107. STERN, *supra* note 90, at 115.

108. *Id.*

109. *Id.*

110. *Id.*

111. Varinsky & Taylor, *supra* note 86, at 56.

112. *Id.*

113. Dys & Pudlow, *supra* note 20, at 10. As Representative Carole Green stated, Florida needs to "take some of the gamesmanship out of this process, and get truth back where it needs to be." *Id.*

114. BLINDER, *supra* note 94, § 9:1(b), at 836.

115. Faulk v. State, 104 So. 2d 519, 521 (Fla. 1958).

III. THE BIRTH OF THE "SANDWICH" RULE

The "sandwich" rule has been an integral part of Florida jurisprudence for more than 150 years.¹¹⁶ The concept of allowing the defendant in a criminal trial to have the final word before the jury was originally codified in chapter 539 of the *Laws of Florida* in 1853.¹¹⁷ In its original form, the statute provided that "in all cases wherein the defendant upon his trial introduces no testimony, he shall, by himself or counsel, be entitled to the concluding argument before the jury,"¹¹⁸ which the Supreme Court of Florida unequivocally ratified in 1858.¹¹⁹

It was not until 1911 that the legislature added the words "except his own"¹²⁰ to the statute to allow a defendant to testify in his or her own behalf without losing the right of having the final say before the jury.¹²¹ The development of the rule finally culminated in 1939,¹²² and thus, the "sandwich" rule as we currently know it was born.

A. *The Common Law*

At common law, the widely accepted rule in the United States¹²³ is that the party with the burden of proof has the right to open and conclude the final argument before the jury.¹²⁴ In criminal trials, that party is the prosecution, who has the great burden of proving the guilt of the defendant beyond a

116. *Id.* (discussing the history of rule 3.250 of the *Florida Rules of Criminal Procedure*).

117. *Id.*

118. *Heffron v. State*, 8 Fla. 73, 74–75 (Fla. 1858) (quoting Pamph. Laws of 1852–3, page 116).

119. *See id.*

120. *Faulk*, 104 So. 2d at 521. Note that throughout this article, the defendant is often referred to with masculine pronouns due to the language used by lawmakers of earlier times; however, these laws and principles certainly apply to females as well.

121. *Id.*

122. *Wike v. State*, 648 So. 2d 683, 686 (Fla. 1994). The rule was ultimately codified as section 918.09, *Florida Statutes*, which was repealed in 1970 after the adoption of rule 3.250 of the *Florida Rules of Criminal Procedure* in 1968. *Id.*

123. Not all countries agree with our common law. *See generally* Marilyn Vavra Kunkel & Gilbert Geis, *Order of Final Argument in Minnesota Criminal Trials*, 42 MINN. L. REV. 549 (1958). The French, for example, have criticized the American criminal justice system because "we know of no such rule of fair play" as they do, namely that "[t]he accused is entitled to the last word." Hon. Pierre Crabités, *Why American Criminal Justice is a Failure*, 23 A.B.A. J. 697, 700 (1937). Because our common law does not allow for such a rule, the French say that we "have no conception of fair play to the accused," and that we have "the souls and minds of hangmen." *Id.* at 700.

124. 75A AM. JUR. 2D *Trial* § 539 (1991); 15 FLA. JUR. 2D *Criminal Law* § 1771 (2001).

reasonable doubt.¹²⁵ Before 1853, this was the law in Florida,¹²⁶ and it continues to be the law in all but three other states.¹²⁷

The rationale behind the common law rule is that the party with the burden of proof should be entitled to the opening and closing arguments to the jury.¹²⁸ This structure for the order of closing arguments is grounded in the premise that justice is best served if the defendant knows the actual arguments that the prosecution will make in support of a conviction *before* the defendant is faced with the decision whether to reply, and if so, what to reply.¹²⁹

Perhaps another reason for the rule has to do with rules of psychology.¹³⁰ The legal system has always understood the principles of primacy and recency, which may be why the overwhelming majority of jurisdictions¹³¹ give the party who carries the burden of proof the absolute right to speak last.¹³² Many psychologists agree that between primacy and recency, recency is more powerful.¹³³

Admittedly, if rule 3.250 was repealed so that it mirrors the common law, the defense would never have the benefit of either primacy or recency at closing argument. However, this seemingly unjust proposition is counter-

125. 5 WAYNE R. LAFAYE ET AL., CRIMINAL PROCEDURE § 24.7(c) (1999).

126. *Faulk*, 104 So. 2d at 521. The common law theories governing closing arguments are still the law in Florida for civil trials. See *City of Fort Lauderdale v. Casino Realty*, 313 So. 2d 649 (Fla. 1975) (Overton, J., concurring) (stating that "[t]he right to open and close final argument rests upon the general principle of law that the party on whom rests the burden of proof is required to go forward with the evidence and . . . is entitled to open and close.").

127. Only Georgia, North Carolina, and South Carolina operate under criminal procedure laws like that of Florida, which allows the defendant in a criminal trial the last word before the jury, if he or she offers no testimony. See GA. CODE ANN. § 17-8-71 (2003); N.C. GEN. R. PRACT. SUPER. AND DIST. CTS. 10; *State v. Mouzon*, 485 S.E.2d 918, 921 (S.C. 1997); *State v. Crowe*, 188 S.E.2d 379, 384 (S.C. 1972); *State v. Brisbane*, 2 S.C.L. (2 Bay) 451 (S.C. 1802).

128. 15 FLA. JUR. 2D *Criminal Law* § 1771 (2001) (citing *Wike v. State*, 648 So. 2d 683, 686 (Fla. 1994)).

129. 5 LAFAYE ET AL., *supra* note 125, § 24.7(c), at 552 (citing FED. R. CRIM. P. 29.1, Notes of Advisory Comm.).

130. STERN, *supra* note 90, at 116.

131. Note that Florida, along with Georgia, North Carolina, and South Carolina, is not among the majority referred to.

132. STERN, *supra* note 90, at 116.

133. *Id.* Mr. Stern disagrees, and argues that it is most effective to begin strongly and corroborate a powerful opening with evidence and testimony along the way. *Id.* at 117. He suggests that being the first to speak at closing argument is beneficial, and advocates that the method of beginning strongly should be applied throughout the trial. *Id.* In his opinion, what the jurors hear first is most powerful. *Id.* This theory that primacy is more powerful than recency may support the old saying that you never get a second chance to make a first impression. See STERN, *supra* note 90, at 116.

acted by the great burden of proof that is placed upon the prosecution.¹³⁴ Additionally, the state cannot appeal an acquittal,¹³⁵ while the defendant, if convicted, has a constitutionally protected right to an appeal.¹³⁶ Repealing rule 3.250 and returning to the principles embedded in the common law favors traditional notions of fairness.¹³⁷

B. Rule 3.250 of the Florida Rules of Criminal Procedure

The portion of rule 3.250 of the *Florida Rules of Criminal Procedure* relevant to this discussion provides that “[i]n all criminal prosecutions the accused may choose to be sworn as a witness in the accused’s own behalf and . . . a defendant offering no testimony in his or her own behalf, except the defendant’s own, shall be entitled to the concluding argument before the jury.”¹³⁸ To properly understand the application of this rule, one must first know what constitutes testimony. Various appellate courts of Florida, including the supreme court, have established that testimony includes documents,¹³⁹ diagrams,¹⁴⁰ a sketch or drawing of the premises upon which the alleged crime took place,¹⁴¹ a video tape viewed by the jury,¹⁴² and still photographs.¹⁴³ Indeed, rule 3.250 applies to documentary evidence.¹⁴⁴

134. 15 FLA. JUR. 2D *Criminal Law* § 1771 (2001); 75A AM. JUR. 2D *Trial* § 539 (2004); 5 LAFAYETTE ET AL., *supra* note 125, § 24.7(c), at 552; STEIN, *supra* note 34, § 5; STERN, *supra* note 90, at 116.

135. *Balikes v. Speleos*, 173 So. 2d 735, 737 (Fla. 3d Dist. Ct. App. 1965) (citing FLA. STAT. § 924.07(1)).

136. *Harriel v. State*, 710 So. 2d 102, 103 (Fla. 4th Dist. Ct. App. 1998) (citing FLA. CONST. art. V, § 4(b)).

137. *United States v. 2,353.28 Acres of Land*, 414 F.2d 965, 972 (5th Cir. 1969) (stating that allowing the party with the burden of proof to proceed first and last at final argument favors traditional notions of fairness).

138. FLA. R. CRIM. P. 3.250.

139. 15 FLA. JUR. 2D *Criminal Law* § 1778 (2004) (citing *Paulk v. State*, 405 So. 2d 785, 786 (Fla. 4th Dist. Ct. App. 1981)).

140. *Grimsley v. State*, 304 So. 2d 493, 494 (Fla. 1st Dist. Ct. App. 1974).

141. *Barkley v. State*, 10 So. 2d 922, 925 (Fla. 1942).

142. *Scott v. State*, 559 So. 2d 269, 273 (Fla. 4th Dist. Ct. App. 1990).

143. 15 FLA. JUR. 2D *Criminal Law* § 1778 (2004) (citing *Kennedy v. State*, 83 So. 2d 4, 5 (Fla. 1955); *Talley v. State*, 36 So. 2d 201, 205 (Fla. 1948)). However, the Fourth District Court of Appeal recently held that still photos taken from a video entered into evidence by the state, which was not a motion-picture video but a compilation of still frames, does not constitute evidence on behalf of the defense separate from that offered by the state. *Zackery v. State*, 849 So. 2d 343, 345–46 (Fla. 4th Dist. Ct. App. 2003). If, however, the defense had made the still photographs from a motion-picture video offered into evidence by the state, those photographs would have constituted evidence, and therefore the defendant would have forgone his right to conclude the argument to the jury, as the photographs would have been additional to that which the state used to prove its case. *Id.* at 345.

Consequently, to secure the rebuttal argument at closing under rule 3.250, a defense attorney may forgo presentation not only of relevant or even significant testimony, but of nearly all documentary evidence as well.¹⁴⁵ For example, in *Williams v. State*,¹⁴⁶ the defendant's attorney failed to call witnesses of whose existence the attorney knew, and who would have corroborated the defendant's story.¹⁴⁷ On appeal, the court found that such a failure on the part of defense counsel was committed intentionally and solely for the purpose of reserving the rebuttal at closing argument in accordance with rule 3.250.¹⁴⁸ The court held that Mr. Williams had been convicted at trial of rape and kidnapping as a consequence of his attorney's ineffective assistance, and stated that it would have made a difference to Mr. Williams' case had his attorney called the relevant witnesses to testify on his behalf.¹⁴⁹ Accordingly, the court held that Mr. Williams did not receive a fair trial and reversed for a new trial.¹⁵⁰

Situations like this one provide opponents of rule 3.250 with ammunition. Not surprisingly, those in favor of repealing rule 3.250 argue that it allows, and on some level may even encourage, defense attorneys to employ tactical procedures at trial.¹⁵¹ As the *Williams* case illustrates, such tactics can include refusing to call witnesses on behalf of the defendant, even if those witnesses' testimony could mean the difference between liberty and imprisonment,¹⁵² for fear of losing the sandwich against the prosecution at closing argument.¹⁵³

This reluctance to give up rebuttal arguments in criminal trials is unlikely to subside. Perhaps one reason for opposition to a new rule is the principle embedded so deeply in American society that a criminal defendant is presumed innocent until proven guilty, and that it is better to lose scores of guilty convictions than to wrongfully convict one innocent person.¹⁵⁴ As John Adams once said,

144. *Id.* at 344.

145. *Diaz v. State*, 747 So. 2d 1021, 1026 (Fla. 3d Dist. Ct. App. 1999).

146. 507 So. 2d 1122 (Fla. 5th Dist. Ct. App. 1987).

147. *Id.* at 1123–24.

148. *Id.* at 1123.

149. *Id.* at 1124.

150. *Id.* at 1125.

151. *Dys & Pudlow*, *supra* note 20, at 1. "What this [bill] is about is truly seeking truth and truly making decisions not based on gamesmanship." *Id.*; see *Diaz*, 747 So. 2d at 1026.

152. *Williams*, 507 So. 2d at 1124.

153. *Id.* at 1123.

154. *Kunkel & Geis*, *supra* note 123, at 549.

We are to look upon it as more beneficial that many guilty persons should escape unpunished than one innocent should suffer. The reason is because it is of more importance to the community that innocence should be protected than it is that guilt should be punished, for guilt and crimes are so frequent in the world that all of them cannot be punished, and many times they happen in such a manner that it is not of much consequence to the public whether they are punished or not. But when innocence itself is brought to the bar and condemned, especially to die, the subject or victim will exclaim, "it is immaterial to me whether I behave well or ill, for virtue itself is no security." And if such a sentiment as this should take place in the mind of the subject there would be an end to all security whatsoever.¹⁵⁵

Indeed, attorneys opposed to the change in the law base their opposition in part on the theory that allowing prosecutors to have the last word will result in wrongful convictions.¹⁵⁶ However, one might conclude that guaranteeing prosecutors the rebuttal in all criminal trials would have entirely the opposite effect, given the propensity of defense attorneys to omit potentially significant evidence for the tactical sake of having the final word before the jury.¹⁵⁷ Without the pressure weighing upon their shoulders to reserve the rebuttal argument at closing, defense attorneys can devote true zeal to the representation of their clients by presenting as much defensive evidence as may be appropriate for the particular case.

The Third District Court of Appeal recently addressed this issue in *Diaz v. State*.¹⁵⁸ At trial, the court encountered a rule 3.250 problem that arose due to an issue with the scope of cross-examination of a particular witness.¹⁵⁹ The court had placed certain restrictions upon cross-examination,¹⁶⁰ relying on the premise set forth by the Supreme Court of Florida that "the defendant may not use cross-examination as a vehicle for presenting defensive evi-

155. STEIN, *supra* note 34, § 553.

156. Dys & Pudlow, *supra* note 20, at 10. The article quotes Tallahassee criminal defense attorney Tim Jansen, who warned that if the bill becomes law, "[y]ou may see more convictions where the evidence does not rise to beyond reasonable doubt." *Id.*

157. *Diaz*, 747 So. 2d at 1026; *Williams*, 507 So. 2d at 1123.

158. 747 So. 2d 1021, 1021 (Fla. 3d Dist. Ct. App. 1999).

159. *Id.*

160. *Id.* at 1023. The court relied on *Steinhorst v. State*, 412 So. 2d 332 (Fla. 1982), in which the Supreme Court of Florida set forth the proper purposes of cross examination: "(1) to weaken, test, or demonstrate the impossibility of the testimony of the witness on direct examination and, (2) to impeach the credibility of the witness Therefore it is held that questions on cross-examination must either relate to credibility or be germane to the matters brought out on direct examination." *Id.* at 337.

dence."¹⁶¹ Defense counsel was therefore unable to question one of the state's witnesses regarding a fact pertinent to establishing his client's defense of self-defense, as the court deemed it outside the scope of cross-examination.¹⁶² Consequently, defense counsel had to "make the witness his own,"¹⁶³ thereby losing the advantageous "sandwich" at closing argument.¹⁶⁴ The defendant was found guilty of second-degree murder.¹⁶⁵

On appeal, the Third District Court of Appeal expressed its agreement with the trial court by stating, with distinct annoyance, that "but for the existence of rule 3.250 of the *Florida Rules of Criminal Procedure* the scope of cross-examination issue presented in this case would not exist," and that "[t]he truth finding process was not compromised."¹⁶⁶ In the court's learned opinion, rule 3.250 as currently written discourages criminal defendants from presenting evidence that could potentially benefit their clients, because defense attorneys feel as if they must pay a price to present such evidence.¹⁶⁷

Although a criminal defense attorney may not withhold evidence which directly exculpates his client of the crime charged for the sake of addressing the jury last in closing argument, the same cannot be said of other types of important evidence which may not be per se exculpatory, but are significant to a secondary, but nevertheless important issue.¹⁶⁸

Before introducing such evidence counsel is forced to weigh what is to be gained by the introduction of that evidence against the loss of the final argument. All too often, defense attorneys believe that their oratorical persuasive abilities in final argument can better serve their clients and the balance is erroneously stricken in favor of closing argument.¹⁶⁹

Additionally, the court pointed out that rule 3.250 promotes "less than ethical behavior in the courtroom."¹⁷⁰ Defense attorneys are prone to produce exhibits with which to question witnesses on cross-examination and to parade before the jury, but then refuse to enter those exhibits into evidence for fear of losing the right to "sandwich" the prosecution with two closing

161. *Id.*

162. *Diaz*, 747 So. 2d at 1024.

163. *Id.* at 1023 (quoting *Steinhorst*, 412 So. 2d at 337).

164. *Id.* at 1023.

165. *Id.* at 1022.

166. *Id.* at 1025.

167. *Diaz v. State*, 747 So. 2d at 1026.

168. *Id.*

169. *Id.*

170. *Id.*

arguments.¹⁷¹ Each of these problems can easily be eliminated by changing rule 3.250 so that the state has the first and final closing arguments in all criminal trials.¹⁷²

C. *The Guilt Phase Versus the Penalty Phase*

It is important to understand that the procedures used during the guilt and penalty phases of a criminal prosecution in Florida are governed by separate rules.¹⁷³ Rule 3.250 of the *Florida Rules of Criminal Procedure* governs closing arguments during the guilt phase.¹⁷⁴ The guilt phase is the part of a criminal trial during which the jury, or in the case of a bench trial, the judge, determines whether the defendant is guilty of committing a crime.¹⁷⁵ By contrast, during the penalty phase, which is also known as the sentencing phase, the finder of fact determines the punishment for a defendant who has already been found guilty.¹⁷⁶ Perhaps the distinction is most simply understood as the difference between “did he commit murder?” and “should he die for committing murder?”¹⁷⁷

In capital cases, the order of closing arguments during the penalty phase is governed by rule 3.780 of the *Florida Rules of Criminal Procedure*, which provides that both the state and the defense will be given an equal opportunity to present one final statement, and the state shall proceed first.¹⁷⁸ Under rule 3.780, a trial judge has no discretion to change the order of final arguments during the penalty phase; it is mandatory that the defendant address the jury last.¹⁷⁹ “[A] defendant *always* presents the final closing argument in the sentencing phase.”¹⁸⁰

The “sandwich” rule has no bearing on the penalty phase of a criminal trial,¹⁸¹ and therefore repealing rule 3.250 will not have any adverse effects on the rights of a defendant in a capital sentencing hearing.

171. *Id.*

172. *Diaz*, 747 So. 2d at 1026.

173. *See* 15 FLA. JUR. 2D *Criminal Law* § 1772 (2001).

174. *Id.* § 1777; FLA. R. CRIM. P. 3.250.

175. BLACK’S LAW DICTIONARY 727 (8th ed. 2004).

176. *Id.* at 1169.

177. Phyllis L. Crocker, *Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases*, 66 FORDHAM L. REV. 21, 28 (1997).

178. FLA. R. CRIM. P. 3.780(c).

179. 15 FLA. JUR. 2D *Criminal Law* § 1772 (2001).

180. *Wike v. State*, 648 So. 2d 683, 687 (Fla. 1994).

181. 15 FLA. JUR. 2D *Criminal Law* § 1772 (2001).

D. The Federal Rules of Criminal Procedure

In the federal system, the order of closing arguments is as follows: the prosecution opens the argument, the defendant is then given an opportunity to reply, and then the prosecution is allowed to reply in rebuttal.¹⁸² This structure is set forth in rule 29.1 of the *Federal Rules of Criminal Procedure*.¹⁸³ To preserve fairness, the government's rebuttal is limited to issues raised by the defendant in his or her argument.¹⁸⁴

As with the common law, the order of closing arguments in federal trials favors the party bearing the burden of proof.¹⁸⁵ The Fifth Circuit has held that because an order that permits the prosecution to proceed first and last during final jury summation mirrors the burden of proof, it is improper for a defendant to argue that allowing the prosecution to do so is unfair.¹⁸⁶ Accordingly, state statutes that imitate the federal system with regard to the order of closing arguments have been upheld against due process challenges.¹⁸⁷ In fact, the Supreme Court of Florida addressed the constitutionality of rule 3.250 when applied "against" the defendant in *Preston v. State*.¹⁸⁸

At trial, Mr. Preston called two witnesses to testify on his behalf, and was thus not entitled to "sandwich" the prosecution with two closing arguments.¹⁸⁹ On appeal, he raised three issues: 1) that the rule violated due process by having a "chilling effect" on a defendant's right to call witnesses, because if a defendant does call witnesses, he relinquishes his right to the first and final arguments at closing; 2) that the rule denies defendants the equal protection of the law guaranteed by the Fourteenth Amendment of the United States Constitution, as it discriminates procedurally against those who do call witnesses; and 3) that allowing the prosecution to have the final argument has the psychological effect of diluting the defendant's presumption of innocence, thereby violating due process.¹⁹⁰

With regard to the defendant's first argument, the court was disinclined to agree that rule 3.250 produces a "chilling effect" on the defendant's right

182. 5 LAFAVE ET AL., *supra* note 125, § 24.7(c), at 552 (citing FED. R. CRIM. P. 29.1).

183. FED. R. CRIM. P. 29.1.

184. 4 LESTER B. ORFIELD, CRIMINAL PROCEDURE UNDER THE FEDERAL RULES § 29.13 (Mark S. Rhodes, ed., 2d ed. 1987 & Supp. 2003) (citing *United States v. Sarmiento*, 744 F.2d 755, 765 (11th Cir. 1984)).

185. *Id.* at 553 (citing *United States v. Brazziel*, 609 F.2d 236 (5th Cir. 1980)).

186. *Brazziel*, 609 F.2d at 237.

187. 5 LAFAVE ET AL., *supra* note 125, § 24.7(c), at 553 (citing *Preston v. State*, 260 So. 2d 501, 502 (Fla. 1972)).

188. 260 So. 2d 501 (Fla. 1972).

189. *Id.* at 503.

190. *Id.*

to call witnesses, as the decision to call witnesses is a basic choice that every defendant must make if his counsel agrees that it is strategically desirable.¹⁹¹ To the defendant's second argument about unequal protection of the laws, the court responded that the accusation is based on the premise that all defendants are similarly situated, which is not at all true.¹⁹² To the contrary, when the situation arises in which the defense may call witnesses to build "its own case for innocence," the defense receives "a more balanced exposure before the jury."¹⁹³ As for the defendant's third issue, the court stated simply that the right to open and close the argument to the jury at final summation, while substantial, has never been raised to constitutional status and the court was not about to raise it then.¹⁹⁴ Instead, the court highlighted the fact that under the common law and under statutes in the vast majority of states, the right to open and close the final arguments belongs to the prosecution, who bears the great burden of proof.¹⁹⁵

After reading the opinion in *Preston*, one might conclude that the Supreme Court of Florida supports a rule that allows the prosecution to address the jury last, given the fine arguments the court makes in support of the structure of summations employed by so many other states.¹⁹⁶ Indeed, the prevailing view throughout the nation with respect to the order of closing arguments in criminal trials emulates the view adopted by the federal system.¹⁹⁷ Florida, Georgia, North Carolina, and South Carolina are the only four out of our fifty states that have not embraced this structure.¹⁹⁸

191. *Id.* at 504.

192. *Id.*

193. *Preston*, 260 So. 2d at 504.

194. *Id.* at 504-05.

195. *Id.* at 505.

196. *Id.* at 504-05.

197. 5 LAFAYETTE ET AL., *supra* note 125, § 24.7(c) at 552.

198. See FLA. R. CRIM. P. 3.250; GA. CODE ANN. § 17-8-71 (2003); N.C. GEN. R. PRACT. SUP. AND DIST. CTS. 10; *State v. Mouzon*, 485 S.E.2d 918, 921 (S.C. 1997); *State v. Crowe*, 188 S.E.2d 379, 384 (S.C. 1972); *State v. Brisbane*, 2 S.C.L. (2 Bay) 451 (S.C. 1802); *Dys & Pudlow*, *supra* note 20, at 10 (mentioning that forty-six other states in the United States employ procedural rules that grant the prosecution the right to the first and final arguments at closing in criminal trials).

IV. THOSE FORTY-SIX OTHER STATES

Although the majority¹⁹⁹ of the United States employs an order for closing arguments that favors traditional notions of fairness,²⁰⁰ not all forty-six of those rules were originally enacted that way. For example, California's statute governing the order of closing arguments in criminal trials initially made the prosecution's opportunity to conclude the argument before the jury merely discretionary,²⁰¹ thereby leaving room for the possibility that the defendant could conclude. However, in 1873, only one year after its enactment, the legislature amended the section giving the prosecution the absolute right to rebut the defendant's closing statement.²⁰² The order of closing arguments in California has since remained the same.²⁰³

The history of the order of closing arguments in Minnesota presents a particularly fascinating story. At one time, Minnesota had the unique distinction of being the only state in the entire country to always give the defendant in criminal trials the concluding argument at final summation.²⁰⁴ The proposition was introduced in 1875 as section 631.07 of the *Minnesota Statutes*²⁰⁵ and, despite frequent agitation for change,²⁰⁶ was not amended until 112 years later.²⁰⁷

199. In most states, the order of closing arguments is either identical to that used by the federal system, or else provides that each side will have the opportunity to speak only once, with the defense being the first to proceed. Examples of the former structure include: Connecticut, CONN. GEN. STAT. ANN. § 54-88 (West 2004); California, CAL. PENAL CODE § 1093(e) (West 2004); and Arkansas, ARK. CODE ANN. § 16-89-123 (Michie 2003). Arkansas, however, includes a clause in its statute that requires both parties to state openly and fully their basis for arguing that a certain verdict applies. *Id.* If a party refuses, the party "so refusing" will be denied the conclusion of the argument. *Id.* New York is an example of the latter type of statute. N.Y. CRIM. PROC. LAW § 260.30 (McKinney 2004). Texas simply requires that the prosecution proceed last, and leaves the specifics to the discretion of the trial judge. TEX. CRIM. PROC. CODE ANN. § 36.07 (Vernon 1981).

200. *United States v. 2,353.38 Acres of Land*, 414 F.2d 965, 972 (5th Cir. 1969) (stating that allowing the party with the burden of proof to proceed first and last at final argument favors traditional notions of fairness).

201. CAL. PENAL CODE § 1093 (2004) (Historical and Statutory notes). As enacted in 1872, the pertinent subsection read: "When the evidence is concluded . . . the District Attorney or other counsel for the people must open and the District Attorney *may* conclude the argument." *Id.* (emphasis added).

202. CAL. PENAL CODE § 1093(e) (2004).

203. *Id.*

204. Kunkel & Geis, *supra* note 123, at 550.

205. *Id.*

206. *Id.* The article cites and discusses a Minnesota Crime Commission report from 1927, which was one of several attempts made to change the law. *Id.*

207. MINN. STAT. ANN. § 631.07 (West 2002) (Historical and Statutory Notes).

During the time that section 631.07 governed in its pre-amended form, researchers conducted a survey of the attorneys in Minnesota, inviting each attorney in the state's eighty-seven counties to respond to a questionnaire.²⁰⁸ Upon analyzing the results, the researchers noted that:

The most persuasive contention of [the] prosecutors is that defense counsel may wander far afield in his final argument, including irrelevant, often prejudicial material, and possibly misleading comments on fact or law. Defense counsel may interject any number of theories on the evidence that the prosecution cannot answer [sic]. One respondent concluded that "... this statute ... enables the defense to throw out a last-minute red herring." The state's remedy is limited to corrective instruction by the presiding judge and the unwise tactic of objecting during defense counsel's argument.²⁰⁹

The researchers further found that "the rights of the accused in a criminal trial are thought to be adequately protected by constitutional safeguards without the additional advantage of having the final argument before the jury," which was one reason those in opposition of the Minnesota statute advocated its amendment.²¹⁰ The study also revealed some attorneys' beliefs that section 631.07 led to fewer convictions.²¹¹ Those attorneys grounded their belief in the notion that a typical jury is "highly vulnerable to strong arguments by counsel,"²¹² and that when the factors and merits of the case appear to be equal,²¹³ the order of closing arguments could be the deciding factor.²¹⁴

On the other hand, some of the prosecutors who responded felt that allowing the defendant to have the final word balances the equities, because prosecutors are privileged with unconstrained financial resources for investigation, more advanced investigative facilities, and cooperation from state and

208. Kunkel & Geis, *supra* note 123, at 551. One hundred twenty-eight attorneys replied. *Id.*

209. *Id.* at 552.

210. *Id.* at 553.

211. *Id.* at 555.

212. Kunkel & Geis, *supra* note 123, at 555. However, the authors of the article noted that psychological studies (conducted during that time) on the importance of the argument produced inconclusive findings. *Id.*

213. *Id.* The heads of the study commented on this statement, saying that if the factors and merits of the case appear to be equal, then the state has established no more than an equal case, and has therefore not met its burden of proof. *Id.*

214. *Id.* at 555.

federal agencies.²¹⁵ One attorney went so far as to say that if the state's evidence is sufficiently compelling in and of itself, then their case should be able to withstand the defense's closing argument.²¹⁶

Clearly, the struggle to change the law in Minnesota was an uphill climb.²¹⁷ Ultimately, however, perseverance prevailed, and the statute was amended in 1987.²¹⁸ It now reads:

when the giving of evidence is concluded in a criminal trial . . . the prosecution may make a closing argument to the jury. The defense may then make its closing argument to the jury. The prosecution shall then have the right to reply in rebuttal to the closing argument of the defense.²¹⁹

The result of this 112-year-old battle surely provides optimism for those who wish to change the laws in the misfit states.

V. FOUR BLACK SHEEP

Each of the four misfit states have similar rules with regard to the order of final arguments that give the defendant an opportunity to close before the jury.²²⁰ None of these rules grants the criminal defendant an absolute right to the last word, as section 631.07 of the *Minnesota Statutes* did in its pre-amended form. Instead, each of the four states makes the defendant's right to close contingent upon the defendant's refusal or failure to present evidence at trial in defense of the charge alleged against him or her.²²¹

South Carolina was the first of the misfit states to adopt such a rule.²²² The Supreme Court of South Carolina made its departure from traditional laws in 1802 with its decision in *State v. Brisbane*.²²³ On an appeal, defense counsel raised the issue of changing the order of closing arguments for the

215. Kunkel & Geis, *supra* note 123, at 554.

216. *Id.*

217. *See id.* According to a news article published by the Star Tribune in 1999, the struggle is far from over. *Id.*; see Paul Gustafson, *Criminal Prosecutors Want Last Word*, STAR TRIB. (Minneapolis-St. Paul), Feb. 20, 1999, at 1B, available at 1999 WL 7493933.

218. MINN. STAT. ANN. § 631.07 (West 2002) (Historical and Statutory Notes).

219. § 631.07.

220. FLA. R. CRIM. P. 3.250; GA. CODE ANN. § 17-8-71 (Supp. 2003); N.C. GEN. R. PRACT. SUP. AND DIST. CTS. 10; *State v. Mouzon*, 485 S.E.2d 918, 921 (S.C. 1997); *State v. Crowe*, 188 S.E.2d 379, 384 (S.C. 1972); *State v. Brisbane*, 2 S.C.L. (2 Bay) 451 (S.C. 1802).

221. FLA. R. CRIM. P. 3.250; § 17-8-71; N.C. GEN. R. PRACT. SUP. AND DIST. CTS. 10; *Mouzon*, 485 S.E.2d at 918; *Crowe*, 188 S.E.2d at 379; *Brisbane*, 2 S.C.L. at 451.

222. *See Brisbane*, 2 S.C.L. at 451.

223. *Id.*

sole purpose of having “the point settled as a rule [there]after.”²²⁴ He swayed the court by stating that allowing the prosecution to open and close the arguments before the jury at final summation was a relict of English rule, and that our country would be better served by a law “more agreeable to the rights of freemen.”²²⁵

At that time, the order of closing arguments in civil trials in South Carolina provided a defendant who called no witnesses in his or her defense with the privilege of the last word.²²⁶ Defense counsel convinced the *Brisbane* court that the rule would serve an even stronger purpose in criminal trials because much more is at stake in a criminal trial.²²⁷ Thus, the rule became one of standing practice in South Carolina’s criminal justice system.²²⁸

It seems clear from the *Brisbane* case that the court’s motivation in implementing the rule was to create a more just system for those defendants who opt not to present a defense at trial; not, as it seems today, to *discourage* defendants from presenting a defense at trial.²²⁹ But the practice of allowing a criminal defendant, who presents no defensive evidence or testimony, to speak to the jury last continues to be upheld by the courts of modern-day South Carolina.²³⁰ One cannot help but wonder whether such support for the rule is based on belief in its validity, or on the typical reluctance of a society to change the way things have been done for over 200 years.

In North Carolina, like in Florida, the order of closing arguments is governed by rule as opposed to common law or statute.²³¹ It provides that in both civil and criminal cases, if the defendant introduces no evidence, the right to open and close the argument to the jury “shall belong to him.”²³² The practice of allowing this order for closing arguments in North Carolina dates back to at least the mid-1800’s.²³³ Today, the Supreme Court of North Caro-

224. *Id.* at 453.

225. *Id.*

226. *Id.*

227. *Brisbane*, 2 S.C.L. at 453.

228. *Id.* at 454.

229. *Diaz v. State*, 747 So. 2d 1021, 1026 (Fla. 3d Dist. Ct. App. 1999). Judge Sorondo made this observation in *Diaz* with regard to this structure of closing arguments. *See id.*

230. *State v. Mouzon*, 485 S.E.2d 918, 921 (S.C. 1997); *State v. Crowe*, 188 S.E.2d 379, 384 (S.C. 1972).

231. *See* N.C. GEN. R. PRACT. SUP. AND DIST. CTS. 10. The order of closing arguments in the penalty phase of a North Carolina trial is governed by statute, and provides that the defendant shall have the right to the final argument. N.C. GEN. STAT. § 15A-2000 (2003).

232. N.C. GEN. R. PRACT. SUP. AND DIST. CTS. 10.

233. *State v. Anderson*, 7 S.E. 678, 680 (N.C. 1888). In *State v. Anderson*, the Supreme Court of North Carolina briefly acknowledged the right of a defendant presenting no evidence in his behalf to conclude the argument before the jury, indicating that by 1888, the rule was common knowledge. *Id.*

lina continues to protect the right of a defendant who presents no evidence in his defense at trial to address the jury finally, by holding that it is not a right of which the defendant can be deprived by an exercise of judicial discretion.²³⁴

Additionally, by statute in North Carolina, up to three attorneys may argue to the jury on behalf of the defendant.²³⁵ The Supreme Court of North Carolina has set forth the rule that in capital cases, although the maximum number of attorneys per side that may argue to the jury is three, each attorney may address the jury as many times as they wish during closing.²³⁶

Thus, for example if one defense attorney grows weary of arguing, he may allow another defense attorney to address the jury and may, upon being refreshed, rise again to make another address during the defendant's time for argument. However, if the defendant presents evidence, all such addresses must be made prior to the prosecution's closing argument.²³⁷

Failure to allow each attorney to address the jury in this manner constitutes prejudice to the defendant per se, and warrants a new trial.²³⁸ Clearly, a defendant in North Carolina who presents no evidence with which to defend himself at trial is entitled to great procedural advantages.

The purpose of Georgia's rule, according to the Supreme Court of Georgia, is to allow counsel for an accused with no defense "every opportunity to persuade the jury that the State has failed to prove his guilt."²³⁹ Allowing a defendant to open and conclude the argument under these circumstances has been common practice in Georgia since 1852.²⁴⁰ Lawmakers created the law to make the order of closing arguments in criminal trials parallel to the order used in civil trials.²⁴¹ Today, this aspect of Georgia's criminal procedure is controlled by section 17-8-71 of the *Georgia Code*.²⁴²

234. *State v. Eury*, 346 S.E.2d 447, 450 (N.C. 1986) (quoting *State v. Raper*, 166 S.E. 314 (N.C. 1932)).

235. N.C. GEN. STAT. § 7A-97 (2003). The statute permits three attorneys per side to address the jury. *Id.*

236. *State v. Barrow*, 517 S.E.2d 374, 376 (N.C. 1999); *State v. Mitchell*, 365 S.E.2d 554, 559 (N.C. 1988); *Eury*, 346 S.E.2d at 450; *State v. Gladden*, 340 S.E.2d 673, 688 (N.C. 1986).

237. *Gladden*, 340 S.E.2d at 688 (explaining the court's interpretation of N.C. GEN. STAT. § 84-14, now § 7A-97, which grants this right).

238. *Barrow*, 517 S.E.2d at 377; *Mitchell*, 365 S.E.2d at 559.

239. *Yeomans v. State*, 192 S.E.2d 362, 365 (Ga. 1972).

240. *Hargrove v. State*, 45 S.E. 58 (Ga. 1903) (explaining the origin of Georgia's rule).

241. *Id.*; see *Phelps v. Thurman*, 74 Ga. 873 (1885); *Chapman v. Atlanta & W. Point R.R.*, 74 Ga. 547 (1885). These civil cases held that unless the defendant's plea was one of justifi-

Although on its face, the statute does not explicitly state that a defendant who offers only his own testimony at trial is entitled to the final closing argument, the courts of Georgia have interpreted the law to mean just that.²⁴³ Unlike Florida, however, Georgia courts have held that a defendant who is wrongfully denied the right to open and close the arguments to the jury, but who, from the evidence, is clearly guilty of the crime alleged, is not entitled to a new trial.²⁴⁴ In Florida, even in light of evidence indicating the defendant's guilt beyond a reasonable doubt, the Supreme Court of Florida has reversed convictions when the defendant has been wrongfully denied his right to open and close the final arguments to the jury.²⁴⁵

The legislatures of Georgia and Florida appear to have been in synch very recently, as the Georgia Senate attempted to change their statute through the passage of Senate Bill 414.²⁴⁶ Much like Florida House Bill 1149, Georgia's bill posed to amend section 17-8-71 and repeal all laws conflicting with the statute as amended, so that "the prosecuting attorney shall always conclude the argument to the jury."²⁴⁷ Unfortunately, the fates of the Georgia and Florida bills also appear to have been in synch, as neither Georgia Senate Bill 414 nor Florida House Bill 1149 will become law in 2004.²⁴⁸

Thus, it is Georgia, North Carolina, South Carolina, and Florida which comprise the four states that have perhaps become known as black sheep among America's criminal justice system.

cation, the defendant was not entitled to the first and last arguments at final summation. *Phelps*, 74 Ga. at 837; *Chapman*, 74 Ga. at 547-48.

242. GA. CODE ANN. § 17-8-71 (2003).

243. *Scott v. State*, 253 S.E.2d 698, 699 (Ga. 1979).

244. *Id.* at 700.

245. *Wike v. State*, 648 So. 2d 683, 686 (Fla. 1994); *Birge v. State*, 92 So. 2d 819, 822 (Fla. 1957); 15 FLA. JUR. 2D *Criminal Law* § 1777 (2001).

246. S. 414, 2004 Gen. Assem., Leg. Sess. (Ga. 2004) available at http://www.legis.state.ga.us/legis/2003_04/versions/sb414_As_passed_Senate_5.htm (last visited Oct. 14, 2004).

247. *Id.*

248. Georgia Senate Bill 414 was not among those signed by the Governor. The list of those bills that were signed by the Governor after the 2003-2004 Session are available at the Georgia General Assembly website. Ga. Gen. Assemb. available at <http://www.legis.state.ga.us/> (last visited Oct. 14, 2004). Florida House Bill 1149 died in committee on April 30, 2004, after being introduced to the Florida Senate and referred to the Judiciary and Criminal Justice Committees. For a complete history, visit the Florida Senate website. Fla. Sen. available at http://www.flsenate.gov/session/index.cfm?Mode=Bills&SubMenu=1&Tab=session&BI_Mode=ViewBillInfo&BillNum=1149&Chamber=House&Year=2004&Title=%2D%3EBill%2520Info%3AH%25201149%2D%3ESession%25202004 (last visited Oct. 14, 2004).

VI. WHAT WILL THE SUPREME COURT OF FLORIDA SAY?

The Supreme Court of Florida enjoys the right, under article V, section 2(a) of the Constitution of Florida, to adopt rules for the practice and procedure in all courts of Florida.²⁴⁹ Rules that are substantive in nature are left to the legislature.²⁵⁰ Neither branch of the government may exercise a power given to the other.²⁵¹ Thus, the fate of the proposition espoused by House Bill 1149 may ultimately depend upon whether the rule is deemed procedural or substantive.²⁵²

The question, of course, is what makes a rule procedural as opposed to substantive? The Supreme Court of Florida defines substantive law as it relates to criminal law and procedure as "that which declares what acts are crimes and prescribes the punishment therefor."²⁵³ The court defined procedural law in the same context as "that which provides or regulates the steps by which one who violates a criminal statute is punished."²⁵⁴ Put simply, substantive law creates and defines rights, while procedural law is "legal machinery"²⁵⁵ through which those rights are made effective.²⁵⁶

If rule 3.250 were ever to be repealed by a statute enacted by the legislature, the issue will arise of how the Supreme Court of Florida will react.²⁵⁷ Attorneys in opposition of the change argue that the rule is procedural, and that the Supreme Court of Florida will find it unconstitutional.²⁵⁸ Not surprisingly, advocates of the change argue that the rule is clearly substantive: "[I]f you don't follow that rule . . . cases are reversed. And they are not subject to a harmless error analysis. That means it is a fundamental error. In

249. FLA. CONST. art. V, § 2(a).

250. *TGI Friday's, Inc. v. Dvorak*, 663 So. 2d 606, 611 (Fla. 1995); *Benyard v. Wainwright*, 322 So. 2d 473, 475 (Fla. 1975).

251. FLA. CONST. art. II, § 3.

252. STAFF ANALY. H.B. 1149 CRIM. PROSECUTIONS, H.R., 2004 Reg. Sess., at 4; see *Dys & Pudlow*, *supra* note 20, at 10.

253. *In re Fla. R. Crim. P.*, 272 So. 2d 65 (Fla. 1972) (quoting *State v. Garcia*, 229 So. 2d 236, 238 (Fla. 1969)).

254. *Fla. R. Crim. P.*, 272 So. 2d at 65 (quoting *Garcia*, 229 So. 2d at 238).

255. *Garcia*, 229 So. 2d at 238.

256. *Id.*; *Benyard v. Wainwright*, 322 So. 2d 473, 475 (Fla. 1975).

257. *Dys & Pudlow*, *supra* note 20, at 10.

258. *Id.* An example of the supreme court's power occurred in 2000, when the court declared the Death Penalty Reform Act of 2000, passed by the legislature, an "unconstitutional encroachment" on the court's "exclusive power to 'adopt rules for the practice and procedure in all courts.'" STAFF ANALY. H.B. 1149 CRIM. PROSECUTIONS, H.R., 2004 Reg. Sess., at 5 (citing *Allen v. Butterworth*, 756 So. 2d 52, 54 (Fla. 2000)).

our view, that means it is a substantive right, which . . . the legislature [has] the total power to change.”²⁵⁹

Admittedly, the Supreme Court of Florida said that the right that is granted to defendants in rule 3.250 is a “vested *procedural* right.”²⁶⁰ However, the court has also said that “[t]he fact that a statutory provision could appropriately be labeled ‘procedural’ does not necessarily mean that it violates article V, section 2(a).”²⁶¹ In fact, the court has refused to nullify procedural statutory provisions that are “intimately related to” or “intertwined with” statutory provisions that are substantive in nature.²⁶² With specific regard to laws that combine substantive and procedural provisions, the Supreme Court of Florida has stated that the judiciary and legislature must work together to give effect to such laws without encroaching on each other’s constitutional power.²⁶³ It is certainly arguable that rule 3.250, even if considered procedural, also involves substantive law, given the fact that failure to follow rule 3.250 is reversible error²⁶⁴ and can result in the reversal of convictions even when the court acknowledges overwhelming evidence of guilt.²⁶⁵ In this respect, the Supreme Court of Florida actually appears to harbor some resentment toward the “sandwich” rule, which is apparent from the court’s words in *Birge v. State*²⁶⁶ when forced to reverse the conviction of a heinous crime: “It is not our privilege to disregard it even though we as individuals might feel that [a defendant] is as guilty as sin itself.”²⁶⁷

Furthermore, the rule was originally enacted by the Florida Legislature, not the Supreme Court of Florida, in 1853.²⁶⁸ When the supreme court ratified the rule in 1858,²⁶⁹ and again in 1958,²⁷⁰ it stated that the rule is a “positive clear-cut unequivocal *legislative* enactment and we are bound to follow it *until* the Legislature in its wisdom sees fit to change it.”²⁷¹ If the legisla-

259. Dys & Pudlow, *supra* note 20, at 10 (citing Brad Thomas, public safety policy director for Governor Jeb Bush). Mr. Thomas also mentioned when interviewed for the article that the Governor supports the proposition contained in House Bill 1149. *Id.*

260. *Wike v. State*, 648 So. 2d 683, 684 (Fla. 1994); *Faulk v. State*, 104 So. 2d 519, 521 (Fla. 1958); *Birge v. State*, 92 So. 2d 819, 822 (Fla. 1957) (emphasis added).

261. *In re Commitment: Cartwright*, 870 So. 2d 152, 158 (Fla. 2d Dist. Ct. App. 2004).

262. *Id.* (citing *Cagle v. Tuttle’s Design-Build, Inc.*, 753 So. 2d 49, 54 (Fla. 2000)).

263. *Leapai v. Milton*, 595 So. 2d 12, 14 (Fla. 1992).

264. *Wike*, 648 So. 2d at 686; *Faulk*, 104 So. 2d at 521; *Birge*, 92 So. 2d at 822.

265. *Wike*, 648 So. 2d at 686; *Birge*, 92 So. 2d at 822.

266. 92 So. 2d at 819.

267. *Id.* at 822.

268. *Heffron v. State*, 8 Fla. 73 (1858).

269. *Id.*

270. *Faulk*, 104 So. 2d at 521.

271. *Id.* (emphasis added).

ture now sees fit to change the law, as House Bill 1149 indicates, then it seems appropriate that the supreme court shall stay true to its word.

VII. CONCLUSION

It is a fundamental tenet of American jurisprudence that the party with the burden of proof shall proceed first and last during the final arguments of a trial.²⁷² It seems unreasonable that in a country which has adopted this procedure in an overwhelming majority of jurisdictions, Florida seeks to remain behind. Rule 3.250 of the *Florida Rules of Criminal Procedure*, as currently written, discourages defendants from presenting evidence in their defense,²⁷³ increases the risk of ineffective assistance of counsel,²⁷⁴ and promotes unethical behavior in the courtroom.²⁷⁵ Whether a bill like House Bill 1149 ultimately becomes law and changes the order of closing arguments in criminal trials in Florida, the problem is unlikely to disappear. Like the prosecutors of Minnesota, who faced a similar struggle years ago, the prosecutors of Florida should not give up on this issue.²⁷⁶

A rule that began perhaps as a protective measure for defendants who fail to defend themselves during their own criminal prosecutions,²⁷⁷ has evolved into a mechanism for snatching away from the prosecution what the common law clearly dictates belongs to them.²⁷⁸ Florida should take the advice of its learned Third District Court of Appeal and change rule 3.250, so that we can "enhance the search for the truth and eliminate the misguided notion that having the final argument in summation is more important than the introduction of potentially important evidence."²⁷⁹

272. 75A AM. JUR. 2D *Trial* § 539 (1991 & Supp. 2004).

273. *Diaz v. State*, 747 So. 2d 1021, 1026 (Fla. 3d Dist. Ct. App. 1999).

274. *Williams v. State*, 507 So. 2d 1122, 1124 (Fla. 5th Dist. Ct. App. 1987); 14 FLA. JUR. 2D *Criminal Law* § 473 (2001).

275. *Diaz*, 747 So. 2d at 1026.

276. Gustafson, *supra* note 217 (reporting that prosecutors vowed to keep pushing for a change in the order of closing arguments until successful).

277. *Preston v. State*, 260 So. 2d 501, 504 (Fla. 1972) (stating that the rule, as the Supreme Court of Florida sees it, is "intended as an aid to those defendants entitled to avail themselves of it, rather than as a limitation upon those desiring to call defense witnesses.") (emphasis added). It is clear, however, that what the court intends the rule to be, and how defendants actually view it, are separate and distinct. *See id.*

278. 15 FLA. JUR. 2D *Criminal Law* § 1771 (2001).

279. *Diaz*, 747 So. 2d at 1026.